Supreme Court, U.S.
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No. 99-

CORRECTED COPY

IN THE SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the regulatory conduct of a nominally private secondary school athletic association, which "establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee," *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 190 F.3d 705 (6th Cir. 1999) (Merritt, J., dissenting from the denial of petition for rehearing *en banc*), and whose "membership consist[s] entirely of institutions located within the same State, many of them public institutions created by the same sovereign," *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), constitutes state action under the Fourteenth Amendment and under 42 U.S.C. § 1983.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brentwood Academy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 3-A) was entered on June 21, 1999, and is reported at 180 F.3d 758 (6th Cir. 1999). The order of the court of appeals denying the petition for rehearing *en banc* was entered on August 30, 1999; that order and the dissent from the denial of rehearing *en banc* (App. 1-C) are reported at 190 F.3d 705 (6th Cir. 1999). The opinion of the United States District Court for the Middle District of Tennessee (App. 1-B), granting petitioner's motion for partial summary judgment and issuing a permanent injunction, is reported at 13 F. Supp. 2d 670 (M.D. Tenn. 1998).

JURISDICTION

The Sixth Circuit entered its judgment on June 21, 1999. Petitioner timely filed a petition for rehearing *en banc* on July 2, 1999. On August 30, 1999, the court of appeals issued its decision and order denying petitioner's petition for rehearing *en banc*. App. 1-C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 are set forth at p. 1-D of the Appendix.

STATEMENT OF THE CASE

The primary underlying constitutional issue in this matter is petitioner's facial and as applied First Amendment free speech challenge to the Recruiting Rule of the Tennessee Secondary Schools Athletic Association (TSSAA). The case is brought under 42 U.S.C. § 1983, and federal jurisdiction exists under 28 U.S.C. §§ 1331 and 1343.

Petitioner is a co-educational, independent, college-preparatory school. Like its counterparts in most states, TSSAA is a nominally private association composed primarily of public schools and local public school officials and governed exclusively by public high school principals, assistant principals or certain qualified public school superintendents. TSSAA coordinates, supervises, and regulates interscholastic athletic competition among both public and private high schools in Tennessee.

TSSAA's Recruiting Rule, which is similar to comparable rules in most states, bars independent schools from taking the initiative in contacting or communicating with prospective student-athletes individually for any reason. The district court held that the Recruiting Rule violated the First Amendment both facially and as applied. In reversing, the Sixth Circuit held that the regulatory conduct of TSSAA in formulating and implementing the Recruiting Rule did not constitute state action. The issue presented in this petition is the state action status of the regulatory conduct of TSSAA.

The TSSAA. Like comparable organizations in other states, TSSAA is a nominally private association of public, independent, and parochial secondary schools from across Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools comprise 84% of the voting membership; independent and parochial schools comprise 16% of the voting membership.

The purpose of TSSAA, as set forth in Article I, Section 2 of its Constitution, is "to stimulate and regulate athletic relations of the secondary schools in Tennessee." App. 5-B. TSSAA rules and regulations are enacted by its

Legislative Council, a nine-member body elected by popular vote in each of nine electoral districts and composed exclusively of public high school officials. TSSAA's administrative authority lies with a Board of Control, similarly elected by popular vote and also exclusively composed of public high school officials. Eligibility for election is based on official status and is limited to high school principals, assistant principals, or qualified superintendents. *Id.*

Since 1925, the Tennessee State Board of Education (SBE) has recognized the functions of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee. App. 10-B. In 1972, by rule, SBE officially designated TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." *Id.*

In 1972, SBE approved the then-current rules and regulations of TSSAA (including the Recruiting Rule) and reserved the right to review and approve the appropriateness of future changes, a power it regularly exercised. App. 10-B—11-B, 23-B—26-B. SBE viewed TSSAA as "the agency [designated] to govern secondary athletics for the [SBE]," reaffirming "the [SBE's] decision to delegate responsibility for management of secondary school athletics to TSSAA." App. 24-B—25-B.

In sum, SBE recognized that "TSSAA works as an agent on behalf of the State Board of Education." App. 25-B. SBE's Executive Director noted that "[c]ompetitive athletics is a big part of the high school experience" and that TSSAA "manages these activities as sanctioned by the State Board of Education." App. 25-B—26-B.

In 1995, apparently in response to court cases holding TSSAA's regulatory conduct to be state action, SBE adopted the following rule: "[SBE] recognizes the value of participation in interscholastic athletics and the role of [TSSAA] in coordinating interscholastic athletic competition. [SBE] authorizes the public schools of the state

to voluntarily maintain membership in [TSSAA]." App. 26-B.

Under the 1995 revision, SBE no longer "designated" TSSAA as the official organization for supervision and regulation of secondary school athletics but instead "recognized" TSSAA's long-held role as being of "value." Further, the 1995 revision singled out TSSAA by name to serve in the same role it had traditionally played. The district court found that, even after the 1995 revision,

> the conduct of the parties has not materially changed.... [T]he connections between TSSAA and the State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed.... In short, the rule amendment had no material effect.... Tennessee, through custom and practice, then explicitly, and then through custom and practice again, has recognized TSSAA as the official body for the regulation and control of interscholastic athletics. A mere change in the words of the regulation, apparently to avoid a litigation claim of state action, did not change the actual conduct of the State and did not change the actual conduct of the TSSAA.

App. 26-B—27-B.

The Recruiting Rule. TSSAA's Recruiting Rule, like comparable rules in most states, prohibits the use of "undue influence" on a student or the parents or guardians of a student "to secure or retain a student for athletic purposes." App. 4-A. The term "undue influence" is defined as "exceeding what is appropriate or normal." App. 6-B.

The terms "appropriate" and "normal" are not defined. App. 37-B. Instead, the Recruiting Rule sets forth a number of examples of conduct that is considered to

constitute "undue influence" per se. These per se rules bar independent schools from taking the initiative in communicating with or contacting prospective student-athletes individually for any reason. App. 40-B. The district court found that the Recruiting Rule's "ban has the effect of preventing any influence on a student, not just 'undue' influence." App. 48-B.

Since the prohibition on initiating contact applies to students "with or without an athletic record," App. 6-B, private schools are at risk if they initiate contact with any prospective students individually—even those without an athletic record—in case those students should, if they enroll, subsequently decide to participate in interscholastic athletics. That risk can only be obviated if the school is willing to bar such students from interscholastic athletics.

Contact with prospective students may not be initiated "by any person connected, or not connected, with the school." *Id.* Private or parochial schools may not contact students enrolled at the public schools, and public schools may not contact private school students. App. 39-B—40-B. A broad exception to the ban on contact applies when either public or private schools contact students enrolled at "feeder" schools.[1] With respect to these "feeder" schools, far-reaching initial and targeted contact is permitted without restraint. As a practical matter, this "feeder pattern" exception does not typically apply to private schools, such as petitioner. App. 40-B. TSSAA has "not explained the purpose for the feeder school exception."[2] App. 47-B.

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[1] A "feeder pattern" exists where a middle school sends a large number of students to a particular high school each year. The term "feeder pattern" is not defined in the TSSAA rules. App. 40-B.

[2] The district court made the following observation about the "feeder pattern" exception: "If conveying information to student-athletes about opportunities to attend out-of-zone schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of 'feeder schools.' The TSSAA cannot have it both ways." App. 47-B—48-B.

The Recruiting Rule Violation. The district court held the Recruiting Rule unconstitutional on its face and as applied. The "as applied" violation stemmed from a letter sent in April 1997 by petitioner's head football coach to all new incoming male students. App. 12-B—13-B. The letter was purely informational; it set forth the dates in May for spring football practice and invited the students to attend if interested. The letter was sent only to new students who had already applied, been accepted for admission and signed a contract to attend petitioner the next fall. App. 14-B. The letter was followed by a telephone call to each of the students to reaffirm that participation in spring practice was entirely optional. *Id.* The students who received the letters were entering high school and, therefore, had to change schools as they were graduating from middle school.

TSSAA regulations allow the students who received the letters and calls to participate in spring practice. Sending the letters and making the telephone calls, however, constituted a Recruiting Rule violation. In other words, it was legal for the incoming students to participate in practice, but illegal for the school to communicate with them about practice. The specific language of the communications was not determinative of the violation.

Despite finding that there was "no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials," TSSAA placed the school's entire athletic program on probation for four years, suspended the football and boys' basketball programs from TSSAA playoffs for two school years (1997-1999), and imposed a $3000 fine. App. 17-B & n.1.

The district court found the Recruiting Rule unconstitutional, both on its face and as applied, as a violation of the First Amendment right of expression and enjoined its enforcement. The Sixth Circuit reversed, holding that SBE's revocation of its official designation of TSSAA to regulate and organize interscholastic athletics negated TSSAA's status as a state actor. App. 12-A—16-A.

Further, the Sixth Circuit held that it was not bound by this Court's "comments" in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), which it deemed not to be "controlling." App. 16-A—17-A. In *Tarkanian*, this Court noted that the regulatory conduct of a high school athletic association whose "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign" would be state action. That situation "of course" contrasted with a national association such as NCAA, whose decisions could not fairly be attributed to a single state such as Nevada.

Despite the fact that this Court in *Tarkanian* footnote 13 approvingly cited two high school athletic association cases in which those associations were held to be state actors, and even though one of those cases involved a private school claiming racial discrimination on the part of the association, the Sixth Circuit held that footnote 13 did not apply when a high school athletic association such as TSSAA dealt with a private school such as petitioner. App. 17-A.

The Sixth Circuit rejected the petition for rehearing *en banc* "[a]lthough a substantial minority of the active judges ... voted for en banc review...." App. 2-C—3-C (Merritt, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. THE STATE ACTION DECISION OF THE SIXTH CIRCUIT IS INCONSISTENT WITH THE DECISIONS OF OTHER APPELLATE COURTS THAT HAVE CONFRONTED THE ISSUE

Establishing uniformity of constitutional doctrine is a core basis for the exercise of this Court's certiorari jurisdiction, and the circumstances of this petition clearly satisfy that fundamental criterion. See R. 10(a), Rules of the Supreme Court of the United States. There is a genuine

conflict between the decision under review and decisions on the same issue by other federal and state appellate courts. In his dissent, Judge Merritt stated the point cogently: "We have created an unnecessary conflict in the circuits on an important question of constitutional law. The conflict will have to be remedied now by the Supreme Court." App. 6-C.

Judge Merritt properly noted that the "panel's holding that TSSAA is not a 'state actor' contradicts the uniform case law in the field from other circuits and is inconsistent with the clearly established constitutional theory of state action." App. 3-C. Judge Merritt could "find no circuit or state supreme court decision supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts." App. 4-C.

In support of its state action analysis, the panel cited no appellate authority that deals with the state action status of high school athletic associations from outside the Sixth Circuit. At no stage of this litigation has TSSAA cited appellate authority from outside the Sixth Circuit holding a high athletic association not to be a state actor.

As Judge Merritt correctly stated in his dissent, the state action holding of the panel in this case is inconsistent with the explicit state action doctrine on this issue from the Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits.[3] It

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[3] See *Moreland v. Western Pa. Interscholastic Athletic League*, 572 F.2d 121, 125 (3d Cir 1978) ("[T]he parties concede that...state action is present."); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-28 (5th Cir. 1968) ("There can be no substantial doubt that conduct of the affairs of LHSAA is state action" and the nominally private status of LHSAA "cannot obscure the real and pervasive involvement of the state in the total program") (cited approvingly in *NCAA v. Tarkanian*, 488 U.S, 179, 193 n.13 (1988); *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) (though like TSSAA a "voluntary association," IHSA had an "overwhelmingly public character" because of the public character of its membership); *In re United States ex rel. Missouri State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (MSHSAA rules were state action because of nature of its composition); *Brenden v. Independent Sch. Dist. 742*, 477

is also inconsistent with controlling doctrine in the Eleventh[4] and Fourth Circuits.[5] Indeed, recent cases from outside the Sixth Circuit have treated the state action status of high school athletic associations as clearly established, settled law: "Actions of voluntary interscholastic associations, of which public schools comprise part of the membership, constitute state action." *Dennin v. The Connecticut Interscholastic Athletic Conf., Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996). See also *Robbins v. Indiana High Sch. Athletic Ass'n*, 941 F. Supp. 786, 791 (S.D. Ind. 1996) ("The IHSAA is an organization whose very existence is entirely dependent upon the absolute cooperation and support of the public school system of the State...and is subject to constitutional

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F.2d 1292, 1295 (8th Cir. 1973) (integral involvement of member public school districts in League's decision-making process constituted state action); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (AIA a state actor because the "member public schools play a substantial role in determining and enforcing the policies and regulations of the AIA" and because the AIA "rulemaking procedure integrally involve[d] the member schools and school districts in the decision making process") (cited approvingly in *Tarkanian*, 488 U.S at 193 n.13).

[4] When it split from the Fifth Circuit on October 1, 1981, the Eleventh Circuit adopted as binding the established precedent of the Fifth Circuit prior to October 1, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). Prior to that date, the Fifth Circuit had held that the regulatory conduct of a high school athletic association comparable to TSSAA was state action. See *supra* note 3. For a case that demonstrates that the issue of the state action status of the regulatory conduct of a high school athletic association is regarded as settled in the Eleventh Circuit, see *Brewer v. Purvis*, 816 F. Supp. 1560, 1575 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir.) (noting that "[t]raditionally, courts have found that high school athletic associations are state actors"), *and cert. denied*, 514 U.S. 1111 (1995).

[5] The role of Virginia in administering its analogous high school athletic association is even more direct than was the case in the other circuit cases, so petitioner regards the Fourth Circuit precedent as supportive but less directly evidencing a split in the circuits. See *O'Connell High Sch. v. The Virginia High Sch. League*, 581 F.2d 81, 83 (4th Cir. 1978) (parties stipulated to existence of state action).

scrutiny as a state actor and as being involved in state action."); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996) ("Preliminarily, everyone agrees that the actions of Section VI constitute state action....").

Further, the decision of the Sixth Circuit in this case conflicts with state supreme court decisions that have addressed the question. As Judge Merritt correctly observed, those courts "have held that their high school interscholastic athletic associations are state actors."[6] App. 4-C.

In addition, as Judge Merritt noted, "[t]his is an important case because all high school interscholastic athletic contests in the states of the Sixth Circuit and in almost all other states in the country are conducted in similar fashion by athletic associations like the TSSAA." App. 3-C. Because of the inconsistency of the decision of the Sixth Circuit with the "basic authorities on state action," and because the Sixth Circuit decision "created an unnecessary conflict in the circuits on an important question of constitutional law," Judge Merritt observed that the "conflict will have to be remedied now by the Supreme Court." App. 6-C. For these reasons, this Court should grant certiorari, or, if it believes that the authorities are overwhelmingly one-sided, exercise its authority to summarily reverse the state action decision of the Sixth Circuit.

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[6] See *Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996); *Mississippi High Sch. Activities Ass'n, Inc. v. Coleman*, 631 So. 2d 768, 773-74 (Miss. 1994); *Kleczak v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 735-36 (R.I. 1992); *Israel v. West Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 484 & n.4 (W. Va. 1989).

II. THIS CASE IS OF NATIONAL IMPORTANCE BECAUSE OF ITS POTENTIAL IMPACT ON SCHOOL CHOICE AND POTENTIAL ADVERSE EFFECT ON ACCOUNTABILITY IN GUARDING AGAINST RACE, SEX, AND RELIGIOUS DISCRIMINATION IN HIGH SCHOOL ATHLETICS

A. *School Choice*

TSSAA's Recruiting Rule substantially restricts the ability of independent and parochial schools to seek out students by informing them of educational opportunities. The rule also makes it more difficult for students and parents to learn about alternative educational options, including financial aid.

TSSAA's Recruiting Rule far transcends the athletic context because it applies to athletes and non-athletes alike and restricts both school representatives and unaffiliated persons. Unless an independent school is willing to avoid interscholastic athletics altogether or to ban students it recruits generally from interscholastic athletics, both the school and the potential students are compromised. This blow against school choice is struck on behalf of the state by public school officials who join together to form an association the Sixth Circuit deemed private, but that has regulatory authority over interscholastic athletics for the entire state. By implementing the various bans on student recruitment — and focusing on students with and without an athletic record — TSSAA is limiting opportunity, not guarding against "undue influence."

A concern with public education has been the occasional mind-set that the public schools have a proprietary interest in the students of a community. But government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships, even at the expense of the child's overall welfare. Maintaining a competitive balance in

athletics is not a legitimate basis for suppressing speech and thereby restricting educational opportunity for students. The district court saw this point but the Sixth Circuit did not.

Properly understood, the role of public schools is to provide a service to students, affording them an opportunity for advancement. A risk is that the community and its public educators can get the sequence backwards, seeing students as objects for use by the state to achieve communal goals. Rather than focusing on the students and promoting their best interest, government and those acting on its behalf have sometimes taken steps deemed in the communal interest that are, unfortunately, at the expense of the educational opportunity of individual students. That treats students as creatures of the state — a means to a communal end.

Cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), however, teach that the liberty of the student and the student's family is the appropriate unit of concern and is afforded constitutional primacy. Government cannot constrain what a student learns. Parents, not the state, ultimately control the nature and scope of educational opportunity for children, at least outside the public school curriculum. There are limits to how far states can go "to foster a homogeneous people." *Meyer*, 262 U.S. at 402. When Oregon required all students to attend public schools, this Court pointedly observed that "[t]he child is not the mere creature of the State" and that the state had no "general power...to standardize its children by forcing them to accept instruction from public teachers only." *Pierce*, 268 U.S. at 535.

In the current context, TSSAA, as agent of and on behalf of the state, has apparently determined that independent schools pose a threat to public education. Rather than viewing independent schools as a means of enhancing educational options available to the students of the state — placing more choices on the educational menu for students and their families — TSSAA has sought to circumscribe and even foreclose opportunities for many

youngsters who may not be aware of independent school alternatives or who may mistakenly believe that independent school enrollment is financially unattainable.

In this scenario, independent schools are misperceived as a threat to the community rather than an alternative opportunity for the community's students. Independent schools, it is feared, may lure students ("our students") away from public schools with an adverse impact on certain aspects of the public system (*e.g.*, the ability of public schools to field championship sports teams).

Instead of acting in the students' best interests by encouraging communication about opportunities for educational enrichment, TSSAA views students as a means to an end — a sports championship for a public school team. This, in effect, treats students as objects, as "mere creature[s] of the state," which *Pierce* forbids. *Id.* That approach turns the traditional role of government — facilitating educational opportunities for youth — on its head and disrespects the primacy of student and family choice in education.

Even though students have a constitutionally-protected interest in attending independent schools (*Pierce*), in participating in athletics as a subject of education in an independent school (*Meyer*), and in receiving information (*Stanley v. Georgia*, 394 U.S. 557, 564 (1969)) about independent school opportunities, TSSAA flatly bars any independent school from "contact[ing] students enrolled at the public schools." App. 39-B. TSSAA's Recruiting Rule assumes that it is appropriate and desirable to establish and maintain a sort of Berlin Wall around public school students, ostensibly protecting them against the undefined use of "undue influence," but in reality inhibiting parents and students from learning about educational options they have a right to discover and embrace. And the state action decision of the Sixth Circuit allows public school officials to effectuate that objective without constitutional scrutiny.

This forms the essence of the district court's holding that TSSAA must be constitutionally accountable and "does not have a legitimate interest in preventing a school, public,

private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." App. 46-B. Indeed, the "State's interest...is the reverse. The State has a profound interest in students making informed choices about education." App. 46-B n.18. As the district court so clearly and cogently put it,

> it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side...by suppressing the speech of the other.... TSSAA cannot control school choice through censorship.

App. 46-B.

B. *Accountability*

Under the Sixth Circuit's decision, the regulatory conduct of a high school athletic association would not be subject to constitutional scrutiny. Claims of race, sex, or religious[7] discrimination would be constitutionally unreviewable. App. 5-C—6-C. This is particularly troublesome for three reasons.

First, TSSAA and comparable organizations have a track record that raises concerns about the lack of accountability. See, e.g., *infra* note 16 (retaliatory conduct); *Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922 (8th

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[7] For example, TSSAA controls state interscholastic athletic championships. If it is not a state actor and is therefore not subject to constitutional scrutiny, how would that affect the analysis of a TSSAA-sponsored religious ceremony at the public high school state football championship? Cf. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir.), *cert. granted*, 68 U.S.L.W. 3325 (U.S. Nov. 15, 1999) (No. 99-62).

Cir. 1976) (refusal to allow girls to try out for boys' cross-country team when no girls' cross-country team exists); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968) (racial segregation); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.) (unreasonable refusal to waive rule adversely affecting student with disability), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Sept. 21, 1999).

Second, while aggrieved individuals in public schools have recourse against their public schools, claims of discrimination by private schools and their students will not be actionable under the decision of the Sixth Circuit. For example, in *St. Augustine*, *supra*, a private school alleged race segregation in the regulation of high school athletics by LHSAA. No constitutional recourse would exist if the decision of the Sixth Circuit stands. Further, even in the public school context, a suit against a public school is not a complete substitute for a claim against the association. Proof of intent is an essential element of a race or sex discrimination action. *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979). It is not clear that purposeful discrimination by a "private" high school athletic association, acquiesced in innocently by a public school, would be imputed to that public school. Cf. *Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690, 696 (N.D. Tex. 1998) (noting issue of whether school district was "ignorant of any discrimination" on part of nominally private interscholastic wrestling association).[8]

Third, in *NCAA v. Smith*, 119 S. Ct. 924 (1999), this Court held that NCAA was not subject to suit under Title IX because it was not a recipient of federal funds. Since Title IX

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[8] This was a concern in the peremptory challenge context, where discriminatory intent of a private litigant would not necessarily be transferred to the court itself. If the private party were not deemed a state actor, discrimination in the court system might have been constitutionally unreviewable if the court innocently enforced a discriminatory peremptory challenge. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991).

(relating to sex discrimination) is patterned on Title VI (relating to race discrimination), see *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), NCAA is not subject to scrutiny under either provision. *Smith* appears to apply to high school athletic associations, calling into question a number of circuit court Title IX decisions.[9] In light of *Smith*, associations such as TSSAA are likely not subject to scrutiny for race or sex discrimination under federal statutory law (Title VI or Title IX). Under the Sixth Circuit's decision, TSSAA is now also not subject to constitutional scrutiny. This Court should review a state action finding that is so far outside the national consensus and has such far-reaching consequences, essentially immunizing the conduct of TSSAA and like organizations from scrutiny or accountability under federal statutory (Title VI or Title IX) or constitutional law.

III. THE DECISION OF THE COURT OF APPEALS IS WRONG AND IN SUBSTANTIAL TENSION WITH DECISIONS OF THIS COURT

Two sets of functional relationships are important in understanding the state action status of high school athletic associations such as TSSAA. The first is the state-level relationship between TSSAA and the SBE, which is the state agency responsible for statewide governance of the system of public education. Petitioner describes this as the "top-down" state action perspective. The second set of relationships involves TSSAA, local officials who largely comprise the membership and who exclusively comprise the governance of the organization, and the local public schools responsible for providing public education in the state.

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[9] See, e.g., *Horner v. KHSAA*, 43 F.3d 265, 271-72 (6th Cir. 1994); *Yellow Springs Exempted Bd. of Educ. v. OHSAA*, 647 F.2d 651, 654-57 (6th Cir. 1981).

Petitioner describes this set of relationships as the "bottom-up" state action perspective.

The Sixth Circuit misperceived the nature of the top-down analysis under this Court's cases. See, e.g., *West v. Atkins*, 487 U.S. 42, 55-56 (1988). The Sixth Circuit ignored entirely the local-government-level relationships — the bottom-up analysis — thereby running afoul of *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

The regulatory conduct of high school athletic associations is attributable to the state for two basic reasons, which track the top-down and bottom-up perspectives.

First, interscholastic athletics constitute an important part of a high school's program and a considerable part of its budget. Every state's constitution imposes a duty on the state to maintain a public school system. When the state explicitly or implicitly delegates a portion of that responsibility — the regulation and coordination of interscholastic athletics — to a separate entity, it cannot escape ultimate constitutional responsibility for the conduct of that entity. See *West*, 487 U.S. at 55-56 (where state has a duty to provide a service, it cannot deprive injured parties of constitutional recourse by delegating provision of the service to a private party); *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 988 (1999) (reaffirming *West*'s delegation principle where state's "constitution or statutory scheme obligates the State to provide" services); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (that state delegates "some portion" of a constitutional or statutory duty to a private party "does not change the governmental character of the power exercised").

Second, high school athletic associations are made up of local public officials (typically public school principals) who, acting collectively, regulate high school athletics and control policy-making and decision-making. An association that is largely composed of local public officials of a single state, that is exclusively governed by local public officials, and that exercises regulatory control over interscholastic athletics — an integral component of a state-mandated

obligation — cannot shed its public character by calling itself a voluntary organization. See *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988) (noting that the regulatory conduct of a high school athletic association would be fairly attributable to the state where the "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign").

A. *Interscholastic Athletics Are an Integral Component of Public Education*

"Extracurricular activities are an important component of an education in today's modern society." *Barnhorst v. Missouri State High Sch. Activities Ass'n*, 504 F. Supp. 449, 457 (W.D. Mo. 1980). This is hardly a recent insight as the ancient proverb *mens sana in corpore sano* ("a sound mind in a sound body") attests specifically regarding the relationship between athletics and education.

In a submission to the Sixth Circuit, Chester E. Finn, Jr. and Daniel Casse, nationally recognized education and public policy experts, asserted that "[e]xtracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds." App. 10-E. They noted the importance of motivation in the educational process, concluding that "like art, drama, and journalism," athletics "can provide the motivation to learn," serving as the "hook to get the attention of students and rivet it on the core curricular mission of the schools." App. 11-E. While athletes may stay in school because of their interest in sports, "learning and the pursuit of knowledge can be infectious." *Id.*

SBE has recognized that "[c]ompetitive athletics is a big part of the high school experience.... TSSAA manages these activities as sanctioned by the [SBE]." App. 25-B — 26-B. Under state law, participation in interscholastic athletics may be substituted for the physical education graduation requirement. Thus, students get academic credit for TSSAA-regulated activities. App. 34-B. The district

court concluded that "interscholastic athletics are intricately connected to the educational process" (App. 33-B) and that there is a "close identification" of TSSAA with the State's "provision of education." App. 36-B.

TSSAA acknowledges that athletics are an integral component of education. In a letter to petitioner, TSSAA's Executive Director stated: "High school athletics is [sic] a part of the total educational program." App. 33-B. In its Constitution, TSSAA recognizes that there is an integral relationship between athletics and other components of the total educational experience: "The athletic field and the gymnasium are classrooms" for "teaching...character, integrity, sportsmanship, and team work." *Id.* TSSAA "aims to co-ordinate [sic] the athletic and scholastic programs" of Tennessee's secondary schools, recognizing that the "physical" and "mental" components of education "complement" each other. *Id.*

Thus, TSSAA recognizes in its own Constitution the integral role that the "athletic program" has within the state's overall educational program. And that educational program falls within the jurisdiction of and is the responsibility of Tennessee's public high schools and their principals, who comprise the membership and governance cadre of TSSAA.

B. The Bottom-Up Perspective: The Decision of the Court of Appeals Is Inconsistent With Decisions of This Court

From the "bottom-up" perspective, state action analysis focuses on the composition of TSSAA's membership, its governance structure, and TSSAA's relationships with local public schools. TSSAA is a joint venture by local public officials and public entities to establish and implement rules regarding the public officials' official duties and the public entities' public responsibility. It was quite inaccurate for the Sixth Circuit to view these high school athletic associations as private — like a coaches' association, teachers' union, or book club.

TSSAA is organized, controlled and governed by public officials and entities and exercises regulatory authority over an important component of Tennessee's educational system — interscholastic athletics. TSSAA is not a private organization structured by private parties unrelated to the state or local governments. It is not a privately owned and operated institution that sells services to the state. Nor is it a private company with a private board and a nongovernmental character whose relationship with government is limited to a commercial interaction such as the sale of services.[10]

Rather, TSSAA is primarily composed of and is exclusively governed by public entities and public officials whose single mission is the regulation of interscholastic athletics. TSSAA's member schools and the local public officials in charge of the governance of the organization are the source of authority with control over the development and implementation of TSSAA rules, policies and regulations. The regulatory conduct of TSSAA, as reflected in the adoption and enforcement of the Recruiting Rule, cannot be disassociated from the control of TSSAA by local public officials and public entities.[11] Public officials and entities, themselves state actors, do not lose their public character when they act in concert to regulate and supervise an integral component of the educational process (interscholastic athletics) otherwise within their jurisdiction as public actors (public high school principals). Based on its mission, composition, and governance structure, TSSAA's regulatory conduct cannot plausibly be characterized as "independent of any particular state." *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988).

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[10] Contrast *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (privately owned nursing home with state Medicaid contract not a state actor).

[11] Tennessee law requires that "[t]here shall be a local public school system operated in each county or combination of counties. There may be a local public school system operated in a municipality or special school district." T.C.A. § 49-1-102(c). There is also a provision for a "local board of education" and a "superintendent or director." *Id.*

The Tarkanian Case. The bottom-up analysis, which was entirely disregarded by the Sixth Circuit, conforms to the analytical approach adopted by this Court in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), which the district court found persuasive and controlling. App. 29-B—30-B. In his dissent, Judge Merritt concluded that the court of appeals' decision "appears to be inconsistent with" *Tarkanian* footnote 13. App. 4-C. Without exception, every other case that mentions footnote 13 has concluded that, under it, the regulatory conduct of a nominally private high school athletic association constitutes state action.[12]

In *Tarkanian*, this Court held that NCAA, a *national* organization, did not act under color of *state* law when it made and enforced its rules and regulations governing intercollegiate athletics. The University of Nevada, Las Vegas (UNLV), which employed Coach Tarkanian, was a member of NCAA, "participated in promulgating [NCAA's] rules," and, therefore, presumably "had some impact on the NCAA's policy determinations." *Tarkanian*, 488 U.S. at 193. But UNLV was only one of "NCAA's several hundred other public and private member institutions," and each of those other institutions (located outside the state of Nevada) "similarly affected those policies." *Id.* Those non-Nevada institutions "did not act under color of Nevada law." *Id.*

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[12] See *Brewer v. Purvis*, 816 F. Supp. 1560, 1574-75 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir.) (holding that "an athletic association whose membership is predominated by institutions created by the same sovereign is a state actor"), *and cert. denied*, 514 U.S. 1111 (1995); *Libby v. The South Inter-Conference Ass'n*, 728 F. Supp. 504, 506-07 (N.D. Ill.), *aff'd*, 921 F.2d 96 (7th Cir. 1990) (same); *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting from holding but agreeing that *Tarkanian* footnote 13 requires a finding of state action); *Bingham v. Oregon Sch. Activities Ass'n*, 37 F. Supp. 2d 1189, 1192-93 (D. Ore. 1999); *Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690, 696 (N.D. Tex. 1998); *Jordan v. Indiana High Sch. Athletic Ass'n*, 813 F. Supp. 1372, 1377 (N.D. Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994); *Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Indiana High Sch. Athletic Ass'n v. Schafer*, 598 N.E.2d 540, 547-50 (Ind. Ct. App. 1992).

Therefore, NCAA's promulgation and enforcement of rules and regulations could not fairly be attributable to Nevada.

NCAA's member institutions, "the vast majority of which were located in States other than Nevada," were the true "source" of the rules and regulations adopted by NCAA, and the organization influenced by those member institutions (NCAA) was "independent of any particular state." *Id.* The state of Nevada, through UNLV, had only a "minor role in the formulation" of NCAA's rules and regulations and in their implementation. Therefore, the conduct of NCAA could not fairly be attributed to the State of Nevada. *Id.* at 195.

Thus, in *Tarkanian*, NCAA was not a state actor because Nevada had only a "minor role in the formation" and implementation of NCAA rules and regulations; neither Nevada itself nor Nevada public officials or institutions exercised control over the governance of NCAA. *Id.* The "collective membership" of NCAA controlled and was the true "source" of its policies, and that collective membership was "independent of any particular state." *Id.* at 193.

In a critical footnote, this Court explained that "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* at n.13. Within a single-state athletic association, the members that comprise the association do not have only a "minor role in the formulation" and implementation of association policy. *Id.* at 195. The "collective membership," who in fact constitute the true "source" of the associations' policies, are not "independent of any particular state." *Id.* at 193. Rather, they are largely public schools and public school officials from within an individual state who run those organizations. Instead of having a "minor role" in the governance of these secondary school athletic associations, these local-level public officials control these associations. Indeed, these associations are a vehicle through which "public institutions created by the same sovereign," *id.* at n.13, act "collective[ly]" and constitute the true "source" of the policies adopted and

implemented by the associations. *Id.* at 193. For that reason, as this Court stated in *Tarkanian*, the regulatory conduct of these secondary school associations is "fairly attributable" to the state in which they are located. This Court expressly cited approvingly two circuit court decisions in support of its conclusion. See *id.* at n.13 (citing *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-28 (5th Cir. 1968) (finding state action in suit by private black high school alleging race discrimination), and *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (finding state action in claim of gender discrimination)).

As the district court held, TSSAA falls within *Tarkanian* footnote 13 since its "collective membership" consists of public institutions (public schools) and public officials (high school principals) from within Tennessee. TSSAA's membership includes virtually every public high school in the state. TSSAA's governance is controlled by the Legislative Council and the Board of Control, both of which are composed exclusively of the principals of public schools. These are public officials, and they control the TSSAA decision-making process. Holding their positions in TSSAA by virtue of their official offices as public school principals, these public officials have "direct control over the development and implementation of TSSAA rules and regulations." *Graham v. TSSAA*, 1995 U.S. Dist. LEXIS 3211, at *15-16 (E.D. Tenn. 1995), *appeal dismissed as moot*, 107 F.3d 870 (6th Cir. 1997); accord *Crocker v. TSSAA*, 735 F. Supp. 753, 759 (M.D. Tenn.), *appeal dismissed as moot*, 908 F.2d 972 (6th Cir. 1990).

The Sixth Circuit declined to apply *Tarkanian* footnote 13 because of petitioner's status as a private school and because footnote 13 noted that, under the *Tarkanian* dissent's theory, NCAA would not act under color of law when regulating private universities. No other court has deemed this distinction analytically significant in the context of a high school athletic association, and it has no force as footnote 13 cited approvingly the *St. Augustine* case, a

private school challenge to the conduct of LHSAA. See *supra* note 3.

Analysis of the dissent in *Tarkanian* is necessary to demonstrate that the Sixth Circuit's distinction does not withstand scrutiny. The *Tarkanian* dissent would have found state action because of the relationship between NCAA and UNLV, a public university, when "UNLV ultimately accepted the NCAA's recommended discipline of Tarkanian." *Tarkanian*, 488 U.S. at 197 n.17. The dissent viewed the case as one of "joint participation" between NCAA (a private entity under this analysis) and UNLV, a public institution — not in the formulation but in the implementation of an NCAA rule. *Id.* at 200 (White, J., dissenting). The dissent would have attributed NCAA's conduct to Nevada because of NCAA's interrelationship with UNLV, a public university, at the enforcement stage. Clearly, that joint participation theory would not apply where the final implementation of an NCAA sanction is carried out by a private university. *Id.* at 202 n.2.

This case involves a challenge to the formulation of TSSAA's Recruiting Rule and to its enforcement directly by TSSAA against petitioner. The joint participation in this case involves TSSAA and the public officials who comprise its membership and governance cadre in the formulation and TSSAA's direct enforcement of the Recruiting Rule. It is that joint participation in the formulation and direct enforcement of the Recruiting Rule that dictates a finding of state action status for TSSAA. TSSAA's regulatory conduct is state action because TSSAA's "collective membership," which is the "source" of its regulatory authority, is composed primarily of public school officials and governed exclusively by those public officials.

For the *Tarkanian* dissent, NCAA had private status until it acted jointly with a public institution in the implementation of NCAA-driven sanctions. At that point NCAA's conduct, under the *Tarkanian* dissent's theory, became attributable to the state. In contrast, TSSAA acted under color of state law when it formulated and directly

enforced the Recruiting Rule because of the nature of its composition and governance. The public or private status of the institution being regulated is analytically irrelevant for determining TSSAA's state action status under *Tarkanian* footnote 13.

The West Case. As Judge Merritt concluded, the Sixth Circuit's decision "seems clearly inconsistent with the theory of state action set out in *West v. Atkins*, 487 U.S. 42, 55-56 (1988)." App. 5-C. *West* requires a "functional" analysis of the activity of the private individual or agency in question to determine the degree of "cooperation" between state and local officials and the actor and an analysis of the degree of "coercion" exercised by the actor over persons under the control of a state or local governmental institution. *Id.*; see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991) (setting forth functional elements in state action analysis).

According to Judge Merritt, the Sixth Circuit "made no effort to analyze the cooperative relationship between TSSAA and the state's public high schools or the coercive power of TSSAA." App. 5-C. He noted that "TSSAA establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee." *Id.* With the TSSAA board "consist[ing] entirely of public school officials,"[13] TSSAA is the government's "agent for

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[13] The public schools' educational programs cannot be separated from their athletic programs. Control over time for interscholastic sports rests with public school authorities. See T.C.A. § 49-6-1002(a). The schools pay the salaries of and hire and fire the coaches. See, e.g., *White v. Banks*, 614 S.W.2d 331, 332 (Tenn. 1981); *Warren v. Polk County Bd. of Educ.*, 613 S.W.2d 222 (Tenn. 1981). "For a school to be a member of TSSAA, its coach must have a Tennessee State teaching license, must be a full-time employee of the Board of Education and must be paid entirely from funds approved by the Board of Education or the governing board of the school." App. 33-B.

controlling an important, highly visible[14] component of its statewide educational program — inter-school athletics." *Id.*

C. The Top-Down Perspective: The Sixth Circuit's Decision Is Inconsistent With Decisions of This Court Because, In Evaluating the Relationship Between TSSAA and the Public System, the Sixth Circuit Inappropriately Relied on a Formal Rather Than a Functional Analysis

A private party may act under color of state law because government has delegated an affirmative governmental obligation to that private party. See *Tarkanian*, 488 U.S. at 195 ("It is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor."). As is the case in all states, Tennessee is obliged under its Constitution to "provide for the maintenance, support and eligibility standards of a system of free public schools." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 151, 156 (Tenn. 1993). Responsibility for designing and maintaining a "free public school system rest[s] on the [state]," *id.* at 151, and is a "duty specifically imposed" on the state. *Id.* at 156.

In this case, the state[15] has delegated its authority over the regulation of an important component of public secondary education to TSSAA, which claims private status. But a state may not, contractually or otherwise, absolve itself of constitutional accountability by delegating to a nominally private entity a responsibility for which the state has an affirmative duty (such as providing and regulating education). In such circumstances, a nominally private party makes decisions as a government proxy. Government cannot

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[14] Public school teams play on public school fields, in school uniforms, and with cheerleading squads bearing official school insignia. Public schools transport students to interscholastic events in school buses bearing the markings of the public school or the school district.

[15] The "state" includes local school districts, which have delegated their responsibility to supervise and coordinate interscholastic athletics.

avoid constitutional accountability by delegating its duty to private entities. Those harmed by the regulatory conduct of the delegatee cannot be deprived of their "means to vindicate" their constitutional rights. *West*, 487 U.S. at 56. Otherwise, the state would be "free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied." *Id.* at n.14. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 987 (1999) (private utilization review organization, delegated authority by state to determine whether treatment provided under a workers compensation program is medically appropriate, "may properly be considered a state actor"). Under the circumstances, the regulatory conduct of TSSAA, which has the power to sanction public[16] and private schools alike, is "fairly attributable" to the state.

Nominally private conduct can become "so entwined with governmental policies or so impregnated with a governmental character" as to become fairly attributable to the state. *Evans v. Newton*, 382 U.S. 296, 299 (1966). Government's identification with certain conduct can make the government a "joint participant" with private actors, thereby resulting in the ostensibly private actors being considered to operate under the color of law. See *Burton v.*

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[16] For example, TSSAA has ordered that a Nashville public high school forfeit all games in which a student participated in violation of a TSSAA rule. In that case, a federal court ordered the school to admit the student and to allow him to play interscholastic athletics. A student with a disability who transferred schools to receive a free appropriate public education to which he was entitled under federal law could not be barred from participating in interscholastic athletics, despite TSSAA's transfer rule and TSSAA's unwillingness to waive that rule. When the district court's injunction was vacated on procedural grounds, TSSAA ordered the school to forfeit all games in which the student had played, "as well as all championships and trophies, which resulted from those games." *Crocker v. TSSAA*, 735 F. Supp. 753, 756 (M.D. Tenn.). The court barred that forfeiture on the ground that TSSAA could not penalize the public high school for obeying a federal court order. *Id.* at 760-61.

Wilmington Parking Auth., 365 U.S. 715, 725 (1961). Where the state is identified with private conduct, it may not effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them.

The "functions of the TSSAA are so closely identified with state activities that the association is [a state actor]." *Kelley v. Metropolitan Bd. of Educ.*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968) (adjudicating claim of race discrimination against TSSAA). Instead of focusing on the functional relationship between TSSAA and the system of public education, as required by decisions of this Court, the court of appeals relied on an empty formalism in rejecting state actor status for TSSAA.

For twenty-four years Tennessee explicitly delegated regulatory and administrative authority over interscholastic athletics to TSSAA,[17] but in 1995 revoked its designation of TSSAA "apparently in response to" cases finding TSSAA to be a state actor and "apparently to avoid a litigation claim of state action." App. 27-B. The revocation was a hollow formalism. As the district court found,

> the conduct of the parties has not materially changed.... [T]he connections between TSSAA and the State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed.... A mere change in the words of the regulation...did not change the actual conduct of the TSSAA,

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[17] Representatives of the State Department of Education and of SBE are members of TSSAA and regularly attend meetings. App. 34-B — 35-B. TSSAA employees, including Respondent Carter, are covered by the state's retirement system and, by statute, are included in the definition of "teachers" for that purpose. App. 33-B. Cf. *St. Augustine High Sch.*, 396 F.2d at 227 (noting that the "paid staff of LHSAA is covered...by the Louisiana Teachers Retirement Act and staff members are legally defined as teachers").

> which constitutes state action. To hold otherwise would raise form over substance.

App. 26-B — 27-B.

Nevertheless, the Sixth Circuit relied solely on this empty formalism, which it deemed "fundamental" and which "dictate[d] the outcome of the present case." App. 16-A. No discussion or analysis of the actual functional effect as opposed to the formalistic conduct was engaged in or apparently deemed relevant, despite the many cases of this Court that require such a functional analysis.[18] See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991) (consideration of whether an "actor is performing a traditional governmental function" an important factor in determining state actor status); *West v. Atkins*, 487 U.S. 42, 55-56 (1988) (state actor status of private physician who provided medical care by contract in state prison was determined by his "function[s] within the state system, not the precise terms of his employment," by examining the nature of the "relationship among the State, the physician, and the prisoner," not just the formal terms of the contract); *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (though employed by the state, public defender is not a state actor because of the "nature of his function" within the adversarial criminal justice system); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974) (holding that the Fourteenth Amendment's "proscription on state action applies de facto as well as de jure"); *Evans v. Newton*, 382 U.S. 296, 301-02 (1966) (public nature of racially segregated park, originally

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[18] Petitioner has never relied on a "public function" theory of state action in this litigation and does not press that theory in this petition. A public function analysis requires that the activity in question be an "exclusive" public function. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978). In contrast, the functional relationships involved in this case — both bottom-up and top-down — need not have been exclusively performed by government. Compare *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-28 (1991) with *id.* at 639-40 (O'Connor, J., dissenting).

devised to City of Macon as trustee and which had been an "integral part" of the city's activities, could not be "dissipated ipso facto by the appointment of 'private' trustees," where there was no clear and demonstrable change in the substantive relationship of the city to the park; private trustees' conduct was state action).

Judge Merritt's dissent properly decried the failure of the Sixth Circuit to engage in a "'functional' analysis of the activity of the private ... agency in question to determine the degree of 'cooperation' between state and local officials and the actor and an analysis of the degree of 'coercion' exercised by the actor over persons under the control of a state or local governmental institution." App. 5-C.

For years, as a result of formally delegated authority, TSSAA has run a critical component of Tennessee's public education program. There continues in fact to be "entwined...management or control," *Evans,* 382 U.S. at 301, between the state and TSSAA, as well as substantial ongoing effects of years of actual and perceived interrelatedness, as no substantial alteration of preexisting policies has taken place. From the top-down perspective, therefore, the structural relationship between TSSAA and SBE and the function performed by TSSAA result in state actor status for TSSAA. As the district court concluded, SBE's formal resolution regarding TSSAA in 1995 does not magically shift TSSAA from state actor to private status.

The Sixth Circuit neither analyzed nor considered these functional realities, focusing exclusively on the revocation of explicit delegation. That formalistic analysis is entirely incompatible with the Supreme Court's analytical approach to these issues and warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6113

BRENTWOOD ACADEMY,
Plaintiff-Appellee,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, Executive Director And Individually,
Defendants-Appellants.

Before: GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's grant of summary judgment in favor of plaintiff Brentwood Academy is REVERSED, the injunction is

VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 1999 FED App. 0225P (6th Cir.)
File Name: 99a0025p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,
Plaintiff-Appellee,

No. 98-6113

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, Executive Director And Individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 97-01249---Todd J. Campbell, District Judge.

Argued: April 23, 1999

Decided and Filed: June 21, 1999

Before: GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Charles Hampton White, CORNELIUS & COLLINS, Nashville, Tennessee, for Appellants, James F. Blumstein, VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Charles Hampton White, Richard L. Colbert, CORNELIUS & COLLINS, Nashville, Tennessee, for Appellants. James F. Blumstein, VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, Tennessee, H. Lee Barfield, II, William Scott Sims, Bass, Berry & Sims, Nashville, Tennessee, G. Thomas Nebel, Nashville, Tennessee, for Appellee. John J. Kitchin, Kansas City, Missouri, Edmund J. Sikorski, Jr., Ann Arbor, Michigan, Steven L. Craig, HEICHECL, CRAIG & PRELAC, Canton, Ohio, Mallory V. Mayse, Colombus, Missouri, Danny C. Reeves, GREENEBAUM, DOLL & McDONALD, Lexington, Kentucky, Leonard E. Ireland, Jr., CLAYTON, JOHNSTON, QUINCEY, IRELAND, FELDER, GADD, ROUNDTREE, Gainesville, Florida, Terrence E. Kiwala, ROOKS, PITTS & PULST, Chicago, Illinois, for Amici Curiae.

OPINION

RONALD LEE GILMAN, Circuit Judge. This appeal involves the constitutionality of the Tennessee Secondary School Athletic Association's "recruiting rule." The rule prohibits member schools from "[t]he use of undue influence . . . to secure or retain a student for athletic purposes . . . ." Brentwood Academy, a private school and a member of the Tennessee Secondary School Athletic Association ("TSSAA"), was found to have violated the rule on two separate occasions. After exhausting its internal appeals of TSSAA-imposed sanctions, Brentwood brought the present lawsuit to allege

violations of its First and Fourteenth Amendment rights, as well as a host of other claims.

The district court granted summary judgment in favor of Brentwood on its claim that the recruiting rule violates the First Amendment, and enjoined TSSAA from enforcing the rule. TSSAA brings this interlocutory appeal, claiming that the district court erred in determining that TSSAA is a state actor, and further arguing that even if it is a state actor, that the recruiting rule is not violative of the First Amendment. For the reasons set forth below, we **REVERSE** the judgment of the district court, **VACATE** the injunction, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Brentwood Academy, a private Christian school located in Brentwood, Tennessee, is by all accounts something of a high school football powerhouse. The football team has been nationally ranked by *USA Today*, has amassed a 310-43 record over the past 28 years (as of March, 1998), and has won at least 7 TSSAA state championships. Brentwood's basketball team is also well known in athletic circles.

In 1997, various rival high school coaches alleged that Brentwood had violated TSSAA rules in a number of respects. TSSAA conducted an investigation, which focused on three specific incidents. The first incident occurred when Brentwood's football coach provided free tickets to a Brentwood football game for a middle school coach and two student athletes. The second claim also involved the football coach, who sent a letter to all incoming ninth-graders accepted at Brentwood that invited them to join the football team for spring practice while they were still in the eighth grade. The final incident involved the basketball coach conducting an

impermissible off-season practice for Brentwood's current players. Because the off-season practice by the basketball coach allegedly violated the aptly-named "off-season practice rule" rather than the "recruiting rule," it is not an issue in this case. The two actions involving the football coach, however, are based on alleged violations of the recruiting rule and are thus the focus of this appeal.

As set forth in TSSAA's regulations, the recruiting rule provides as follows:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule.

TSSAA By-laws, Article II, Section 21. The regulations then contain approximately three pages of interpretation to assist member schools in understanding the types of "influence" that TSSAA considers "undue."

With cooperation from Brentwood, TSSAA completed its investigation in August of 1997. TSSAA concluded that all three incidents described above violated TSSAA rules. Brentwood was declared ineligible to participate in TSSAA tournaments in football and basketball for one year, and was placed on probation for two years. By the end of TSSAA's two-step internal appeals process, the penalties had actually increased, banning Brentwood from the tournaments for two years, placing the school on probation for four years, and fining the school $3,000.

Brentwood filed the present suit against TSSAA on December 12, 1997, seeking an injunction against the enforcement of the recruiting rule and alleging, among other state and federal claims, a violation of 42 U.S.C. § 1983. The § 1983 claim charged that TSSAA had deprived Brentwood of its First and Fourteenth Amendment rights under color of state law. Cross-motions for summary judgment were filed with respect to all claims except for Brentwood's allegations of antitrust violations. The district court granted summary judgment in favor of Brentwood on its First Amendment claims and enjoined enforcement of the recruiting rule. It granted summary judgment in favor of TSSAA on one state-law claim, and denied both motions on the remaining counts. TSSAA now appeals the district court's decision that TSSAA violated the First Amendment, arguing that it is not a "state actor," and that event if it is, its actions were valid under the First Amendment.

II. ANALYSIS

A. Standard of review

We review *de novo* the district court's grant of summary judgment. *See, e.g., Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenity Radio Corp.*, 475 U.S. 574, 587 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial is presented

when there is sufficient "evidence on which the jury could reasonably find for the [non-moving party]." *Id.* at 252.

B. State action and TSSAA

To prevail on a First Amendment claim, the plaintiff must first make a showing that the defendant is a "state actor." "When Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred 'under color of' state law; thus liability attaches only to those wrongdoers who carry a badge of authority of a State and represent it in some capacity . . . ." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). The Supreme Court has mandated careful adherence to the "state action" requirement because it "preserves an area of individual freedom by limiting the reach of federal law." *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 936 (1982).

Analyzing the structure and function of TSSAA is therefore essential to the inquiry before us. Founded in 1925, TSSAA is a voluntary association incorporated under the laws of Tennessee. It is composed of 290 public schools and 55 private schools. TSSAA's constitution and bylaws specify that the administrative authority of TSSAA is vested in a Board of Control consisting of nine members elected by the member schools. Each Board member represents a particular region of Tennessee. The Board members are principals or superintendents of the member schools. At all times relevant to this action, the Board was comprised exclusively of public high school administrators, although private high school administrators are equally eligible for election to the board.

TSSAA receives no funding from the state, nor are the salaries of its staff paid by the state. Its revenues are derived primarily from gate receipts at TSSAA tournaments. TSSAA

schedules only the state tournaments, not the vast majority of interscholastic contests. Significantly, when it uses public facilities for these events, it must enter into a contract with the state to do so and pay for the privilege.

There is no authority anywhere in the Tennessee Code authorizing the state to conduct interscholastic athletics or to empower another entity to conduct such athletics on its behalf. Although a State Board of Education rule in effect from 1972 to 1995 "designated" TSSAA to conduct interscholastic athletics, that rule has since been repealed. The current rule states that public schools in Tennessee are authorized to join TSSAA, but are also authorized to withdraw from membership if they so choose.

These facts make clear that TSSAA is not an arm of the government. The more difficult question is whether we are required to treat it as such because it is so intertwined with the government that its actions should be considered as those of the state.

C. The *Blum* trilogy

The Supreme Court has devoted considerable attention to the question of what constitutes state action. In 1982, the Court decided three cases that defined the contours of the state action doctrine with respect to nominally private parties. *See Blum v. Yaretsky*, 457 U.S. 991 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982). These cases have collectively become known as the "*Blum* trilogy."

In *Blum*, the Court reviewed a challenge to a private nursing home's transfer and discharge policy. The nursing home was extensively regulated by the state of New York and received a

significant percentage of its funding from the federal government in the form of Medicaid reimbursement. In holding that the nursing home was not a state actor, the Court concluded that being subject to state regulation does not by itself convert the actions of a private organization into state action. *See id.* at 1004. The nursing home's use of government funds was also held insufficient to establish state action. *See Blum*, 457 U.S. at 1005.

In *Lugar*, Edmondson Oil had attached Lugar's property to satisfy an outstanding debt. Lugar sued, alleging that Edmondson Oil had acted jointly with the state to deprive him of his property without due process of law. The Court held that Lugar had to establish that the conduct allegedly causing the deprivation of a constitutional right was "fairly attributable" to the state. *See Lugar*, 457 U.S. at 937. In determining the question of fair attribution, the party charged with the deprivation must be a person who may be fairly said to be a state actor, either because he acted in his capacity as a state official, or because he has acted together with or has obtained significant aid from state officials. *See id.* The *Lugar* Court concluded that because the prejudgment attachment statute required judicial action to be enforced, there was sufficient government involvement to constitute state action.

Finally, in *Rendell-Baker*, the Supreme Court held that a school operated by a private corporation did not exercise state power when it discharged teachers (allegedly in violation of their First Amendment rights), even though the school had contracts with the state to pay for the education of most of the student body and most of its funding came from the government. *See Rendell-Baker*, 457 U.S. at 839-43.

D. Sixth Circuit Precedent

The *Blum* trilogy provides a framework for determining what conduct may be fairly attributable to the state. It does not set out a single test, because the Court has held that determinations of state action must be made on a case-by-case basis. *See Lugar*, 457 U.S. at 939. In attempting to enforce the mandate of the *Blum* trilogy, our circuit has applied three different tests. These are (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship test. *See Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (holding that a private, non-profit corporation that contracted to provide mental health services to a county government in Ohio was not a state actor). The focus of all three tests is to determine whether the alleged state actor's actions are "fairly attributable to the state." *Id.*

1. The public function test

The public function test asks whether "the private entity exercise[s] powers which are traditionally exclusively reserved to the state, such as holding elections, or eminent domain." *Wolotsky*, 960 F.2d at 1335 (internal citations omitted). Clearly the conduct of interscholastic sports is not such a power. The Supreme Court stated in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545 (1987), that "[n]either the conduct nor the coordination of amateur sports has been a traditional government function." We also note that all of the circuits that have considered the issue, including our own, have held that there is no constitutional right to participate in interscholastic sports. *See Alerding v. Ohio High Sch. Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985); *Niles v. Texas Univ. Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983); *Herbert v. Ventetuolo*, 638 F.2d (1st Cir. 1981); *Moreland v. Pennsylvania Interscholastic Athletic Ass'n*, 572

F.2d 121 (3d Cir. 1978); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976). In light of these precedents, TSSAA cannot be considered a state actor under the public function test.

2. State compulsion

The state compulsion test requires that the party seeking to establish state action prove that the state has so coerced or encouraged a private entity to act that the choice of that entity must be regarded as the choice of the state. *See Wolotsky*, 960 F.2d at 1335. As detailed in Part II.B. above, the state of Tennessee's interaction with TSSAA has been minimal. The state's most significant involvement with TSSAA was the now-repealed Board of Education rule "designating" TSSAA to conduct interscholastic activities. The Supreme Court has made clear, however, that designation alone is not enough to turn a private actor into a state actor. In *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), a customer whose power was turned off for non-payment argued that he was entitled to a hearing under the Due Process Clause of the Fourteenth Amendment. The Court held that even though Pennsylvania had granted the power company a monopoly and the public utility board had explicitly authorized the regulations in question, there was no state action because the state had not directed or ordered that the customer's power be terminated. *See id.* at 358.

The state of Tennessee has far less contact with TSSAA than Pennsylvania had with Metropolitan Edison. The Pennsylvania legislature granted Metropolitan Edison a monopoly, heavily regulated it, and had a state oversight board that actually approved the power shut-off regulations. In the present case, the Tennessee legislature has never even mentioned TSSAA, much less given it any special authority. As a result,

Brentwood has failed to establish that TSSAA is a state actor under the state compulsion test.

3. Symbiotic relationship

The remaining and therefore dispositive question is whether TSSAA is a state actor under the "symbiotic relationship" test. *See Wolotsky*, 960 F.2d at 1335. A symbiotic relationship exists when there is "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* In *Crowder v. Conlon*, 740 F.2d 447, 450-51 (6th Cir. 1984), this court held that neither extensive state regulation nor state funding of a private entity are sufficient to support a finding of a symbiotic relationship. Instead, a "State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 450 (quoting *Blum*, 457 U.S. at 1004.)

a. Burrows

Burrows v. Ohio High School Athletic Association, 891 F.2d 122 (6th Cir. 1989), is instructive in this regard. In *Burrows* this court considered a challenge to an Ohio High School Athletic Association (OHSAA) rule that deprived students of one year of interscholastic eligibility if they participated in soccer leagues outside of the school system. After reviewing the structure and functions of OHSAA, the *Burrows* court concluded that it was not a state actor. *Burrows* held that in order to prove that a high school athletic association is acting under color of state law, a plaintiff has the burden of proving that the association's action was "caused, controlled or directed

by the state or its agencies." *Id.* at 125. This Brentwood has failed to do in the present case.

Because *Burrows* is the most recent pronouncement by our court on the question of whether a state high school athletic association is a state actor, we would under normal circumstances look no further in finding persuasive support for our conclusion that TSSAA is not a state actor. For reasons unknown, however, *Burrows* does not cite either of two earlier Sixth Circuit cases that discuss the state-actor status of OHSAA and reach the opposite conclusion. We are therefore obligated to consider each of these prior cases.

b. Yellow Springs

The earlier of the two uncited cases is *Yellow Springs v. Ohio High School Athletic Association*, 647 F.2d 651, 653 (6th Cir. 1981). Both the district court and Brentwood rely heavily on *Yellow Springs* to support their conclusion that TSSAA is a state actor. They reason that OHSAA and TSSAA are functionally indistinguishable, and that *Yellow Springs* is controlling because it precedes *Burrows*.

If they are correct, they *Yellow Springs* would necessarily bind us. We agree with Brentwood that when a later decision of this court conflicts with the holding of a prior decision, the earlier case should control. *See Walker v. Mortham*, 158 F.3d 1177, 1188-89 n.25 (11th Cir. 1998) (holding that, when faced with conflicting precedent, the earlier cases must control even if later cases are better reasoned). *See also Salmi v. Secretary of Health & Human Serv.*, 774 F.2d 685, 689 (6th Cir. 1985) (holding that a panel of this court cannot overrule the decision of another panel, and that the prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this

court sitting en banc overrules the prior decision.) The holding of *Yellow Springs*, however, is not in conflict with either *Burrows* or our present decision.

In *Yellow Springs*, a school district brought a Title IX challenge to an OHSAA rule that prohibited co-ed teams in contact sports. *See* 20 U.S.C. §§ 1681-88. In reciting the facts of the case, this court wrote that "OHSAA's character as a semi-official in its activities and its symbiotic relationship with the state lead to the conclusion that the trial judge correctly found state action." *Yellow Springs*, 647 F.2d at 653. Brentwood argues that this statement is binding in the case before us. We disagree. *Yellow Springs* involved Title IX, a statute enacted to discourage sex discrimination in education regardless of whether the action was governmental or not. Unlike claims brought under the Fourteenth Amendment, private entities may be liable under Title IX without a showing of state action, as long as they are a recipient of federal funds. *See Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994) ("Title IX prohibits sex discrimination under any education program or activity receiving federal funds.") Because the *Yellow Springs* discussion of state action in the context of Title IX was superfluous, and the body of the *Yellow Springs* analysis concentrated on Title IX, the statements about state action are *dicta* and do not have the force of law.

c. Alerding

This brings us to *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315 (6th Cir. 1985), the other relevant case not cited by *Burrows*. Brentwood argues that even if *Yellow Springs* is not controlling authority, we are still bound by *Alerding*. *Alerding* involved a challenge to an OHSAA rule that prohibited students who lived in other states from

participating in interscholastic athletics in Ohio. Student-athletes affected by the rule sued OHSAA pursuant to 42 U.S.C. § 1983, alleging an infringement of their rights under the Privileges and Immunities Clause of the Fourteenth Amendment. The entire body of the opinion is devoted to a discussion of the students' claims, which the court ultimately rejected.

Alerding's mention of the state action issue is relegated to a single footnote. It provides no analysis on this point whatsoever, and cites only one case, *Yellow Springs*, which dealt with the state action question in *dicta*. More importantly, the relevant footnote reads as follows:

> OHSAA is a state actor for purposes of § 1983 because Ohio has implicitly delegated to OHSAA its power to regulate and organize interscholastic activities. [citing *Yellow Springs*].

Alerding, 779 F.2d at 316 n.1. Thus, Alerding's finding of state action was premised exclusively on Ohio's "implicit delegation." In contrast, Tennessee explicitly *revoked* its designation of TSSAA to regulate and organize interscholastic athletics when the State Board of Education's rule to that effect was repealed in 1995. Because we find this distinction fundamental, we conclude that *Alerding* does not dictate the outcome of the present case.

E. Tarkanian's footnote 13

Finally, we note that in finding state action, the district court relied on the fact that the Supreme Court indicated in *dicta* that a high school athletic association might potentially be a state actor. *See NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988) ("This situation would . . . be different if the membership

consisted entirely of institutions located within the same state, many of them public institutions created by the same sovereign.") In the very same footnote, however, the majority opinion notes that all nine justices agreed that even if an athletic association is a state actor when dealing with a public school, it "was not acting under color of state law in its relationships with private universities." As a result, we do not find that the Supreme Court's comments are controlling in the present case.

F. TSSAA not a state actor

Based on the above analysis, we conclude that (1) Brentwood has failed to establish that TSSAA's actions are fairly attributable to the state of Tennessee, and (2) we are not obligated to hold otherwise because of any prior binding precedent. As a result, no § 1983 claim may be brought against TSSAA by a member school that has voluntarily associated with the private organization. We therefore have no need to reach the merits of Brentwood's claims under the First Amendment. In so stating, we do not necessarily endorse the wisdom of the rule that TSSAA is attempting to enforce in this case. Brentwood has made strong arguments that the rule is vague and not well-tailored to the perceived evil sought to be avoided, which in turn may lead to arbitrary enforcement. Such complaints, however, are to be resolved among the membership of the TSSAA, not in the federal courts. We agree with the Fifth Circuit's statement that

> we are not super referees over high school athletic programs. Questions about eligibility for competition may loom large in the eyes of youths, even parents. We do not disparage their interest in concluding, as here, that these issues are not of constitutional magnitude.

Hardy v. University Interscholastic League, 759 F.2d 1233, 1235 (5th Cir. 1985).

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the district court's grant of summary judgment in favor of Brentwood, **VACATE** the injunction, and **REMAND** the case for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY	)	
	)	
V.	)	NO. 3:97-1249
	)	JUDGE CAMPBELL
	)	
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually	)	

ORDER

Pending before the Court are Plaintiff Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) and Defendants' Motion for Summary Judgment (Docket No. 47). The Court heard oral argument on the pending Motions on July 16, 1998.

For the reasons described in the accompanying Memorandum, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is GRANTED in part and DENIED in part. Brentwood Academy's Motion is GRANTED as to its claim that TSSAA's Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy. Accordingly, Defendants are hereby enjoined from any use of the Recruiting Rule. All sanctions imposed by the

TSSAA on Brentwood Academy pursuant to the August 27, 1997 letter from the TSSAA to Brentwood Academy (Docket No. 1, Ex. G) are void and unenforceable.

Defendants' Motion for Summary Judgment (Docket No. 47) is GRANTED in part and DENIED in part. Defendants' Motion is GRANTED as to Plaintiff's equitable estoppel claim and that claim is DISMISSED.

The disposition of other issues presented by the pending Motions is discussed in the Memorandum.

It is so ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY	)	
	)	
V.	)	NO. 3:97-1249
	)	JUDGE CAMPBELL
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually	)	

MEMORANDUM

I. Introduction

Pending before the Court are Plaintiff Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) and Defendants' Motion for Summary Judgment (Docket No. 47). The Court heard oral argument on the pending Motions on July 16, 1998. For the reasons described herein, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is GRANTED in part and DENIED in part, and Defendants' Motion for Summary Judgment (Docket No. 47) is GRANTED in part and DENIED in part.

Brentwood Academy sued the Tennessee Secondary Schools Athletic Association ("TSSAA") and its Executive Director, Ronnie Carter, alleging violation of Plaintiff's First

Amendment rights of free speech (Count I); violation of Plaintiff's Fourteenth Amendment substantive and procedural due process rights (Counts II and III); violation of federal antitrust laws (Count IV); equitable estoppel (Count V); and unfair, unreasonable, arbitrary and oppressive action in violation of state law (Count VI). Plaintiff seeks a permanent injunction barring the TSSAA from enforcing its "Recruiting Rule," as written and as applied to Plaintiff; money damages; attorneys' fees and costs. All the above claims, except the antitrust claims, are the subject of the pending motions.

II. Facts

Plaintiff Brentwood Academy is a co-educational, independent, college-preparatory school located in Brentwood, Williamson County, Tennessee. Combined Stipulations (Docket No. 24), ¶ 3. Brentwood Academy is a member of Defendant TSSAA, and the school's interscholastic athletic teams regularly participate in athletic contests regulated by the TSSAA. Id., ¶ 9.

Defendant TSSAA is a non-profit corporation organized and existing under the laws of the State of Tennessee, with its principal place of business in Hermitage, Davidson County, Tennessee. Id., ¶ 10.

Defendant Ronnie Carter is the Executive Director of the TSSAA and, at all times relevant to this action, acted as an employee and agent of the TSSAA and within the scope of his authority as an employee and agent. Id., ¶ 11.

The TSSAA is an association of public, independent and parochial secondary schools from across the state of Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools

compose 84% of the voting membership of the TSSAA, and independent and parochial schools compose 16% of the voting membership of the TSSAA. Id., ¶ 12.

The purpose of the TSSAA is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Art. I, Section 2.

By electing to be a member of TSSAA, each member school agrees to abide by the Constitution and By-laws of TSSAA. Combined Stipulations, ¶ 44. The parties have stipulated the authenticity of the TSSAA Constitution and By-laws. Id., ¶¶ 17, 18.

The rules and regulations of the TSSAA are enacted by its Legislative Council, a nine-member body composed of high school principals or assistant principals or qualified superintendents elected by popular vote in each of nine electoral districts. Combined Stipulations, ¶ 14. The administrative authority of the TSSAA is vested in a Board of Control, composed of nine members who are high school principals or superintendents, similarly elected by popular vote. TSSAA Constitution, Art. III.

All the voting members of the Legislative Council and the Board of Control in 1997 were public high school administrators. None of the voting members of the Legislative Council and the Board of Control in 1997 were principals of independent or parochial schools. Combined Stipulations, ¶ 15.

The main question presented in this case is whether the following Recruiting Rule of the TSSAA violates the First Amendment or the Fourteenth Amendment to the United States Constitution:

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school.

This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the

seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.).

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule"
and
Understanding "What Is Undue Influence"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s)

responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

TSSAA By-laws, Art. II, Section 21. TSSAA's first version of the "recruiting rule" was adopted in 1935, and the rule in all its forms since 1935 has prohibited "the use of undue influence." Combined Stipulations, ¶ 54.

Since 1925, the State Board of Education has recognized the functions of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools in Tennessee. See Docket No. 52 (Affidavit of Jerome V. Sailors), p. 2. In 1972, by rule, the State Board of Education designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08).

In addition, in 1972, the State Board approved the current rules and regulations of the TSSAA and reserved the

right to review the appropriateness of any future changes. Id. On several occasions between 1972 and 1992, the State Board reviewed and approved the TSSAA rules, including the Recruiting Rule at issue in this case. Docket No. 66 (Affidavit of Gary Nixon), attachment, pp. 24-25, 34, 38, 44, 52-53, 73-74, 76-78, 82, 88.

In 1995, the State Board of Education adopted an amendment to Rule 0520-1-2-.08, which deleted the former rule and replaced it with the following: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." Tenn. Bd. of Educ. Rule 0520-1-2-.08 and Docket No. 66, attachment, p. 183.

In 1997, certain public high school coaches made allegations of recruiting violations by Brentwood Academy, and those allegations were subsequently communicated to the TSSAA. Combined Stipulations, ¶¶ 35-37. Based on the allegations, the TSSAA, through Defendant Carter, began an investigation. Id., ¶ 38. TSSAA made various claims, but only three allegations ultimately resulted in violations and penalties.

One claim involved the Brentwood Academy football coach, Carlton Flatt, allegedly providing free game tickets to a coach at a public middle school. The allegation was that Kevin Armstrong, a teacher and coach at Neely's Bend Middle School, used the free tickets for himself and two middle-school student-athletes, allegedly in violation of the Recruiting Rule. Complaint (Docket No. 1), Exs. A, D and G.

Another claim involved a Brentwood Academy basketball coach, John Patton, allegedly conducting impermissible off-season basketball practice with certain Brentwood Academy students in violation of the Off-Season Practice Rule. Id.

A third claim involved letters and telephone calls from the Brentwood Academy football coach, Carlton Flatt, to students from other schools who had contractually agreed to attend Brentwood Academy, to invite them to spring football practice at Brentwood Academy, allegedly in violation of the Recruiting Rule. Id.

In the spring of 1997, the father of an incoming ninth-grade student, who had already been accepted for admission to Brentwood Academy and had committed to attend in the fall, requested permission for his son to participate in Brentwood Academy's spring football practice. Affidavit of Carlton Flatt (Docket No. 30), ¶ 17; and Defendants' Local Rule Response ("Local Rule Response") (Docket No. 46), ¶ 77.

Brentwood Academy contends that in order to avoid an incorrect public perception and to avoid singling anyone out for special attention, the school sent a form letter (the "Spring Practice Letter") to all new incoming male students in grades nine and above, informing them of the dates for spring practice and inviting them to participate if interested. Flatt Affidavit, ¶ 19; and Local Rule Response, ¶ 80.

It is not a violation of the Recruiting Rule for incoming students to participate in school activities at Brentwood Academy, including spring football practice, prior to the time that they actually begin school at Brentwood Academy. See Docket No. 31, Ex. O (Carter Deposition), p. 39; and Local Rule Response, ¶ 75. The alleged violation of the Recruiting

Rule is the invitation to attend football practice, not the football practice itself.

The Spring Practice Letter was mailed on or about April 23, 1997, to all new incoming male students who had signed contracts to attend Brentwood Academy. Docket No. 31, Ex. Q (Brasher Deposition), p. 63; Local Rule Response, ¶ 81.

The full text of the Spring Practice Letter reads as follows:

> Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.
>
> Spring practice will begin May 1, 1997 and conclude and May 14, 1997. Practice begins at 3:30 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.
>
> In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an *Eagle*.
>
> Your Coach,
> /s/ Carlton Flatt

Docket No. 31, Ex. J; and Local Rule Response, ¶ 82.

Prior to receiving the Spring Practice Letter, each of the students and their parents had already made initial contact with Brentwood Academy to express interest in attending, applied for admission, visited the campus, taken the admissions test, been accepted by Brentwood Academy, and entered into a contract to attend the school. Flatt Affidavit, ¶ 20; and Local Rule Response, ¶ 83.

After receiving the Spring Practice Letter, a parent telephoned Coach Flatt to ask whether it was important for his son to attend spring practice at Brentwood Academy if it conflicted with an activity in which the student was involved at his middle school. Flatt Affidavit, ¶ 22; and Local Rule Response ¶ 85.

Although the Letter indicated that spring practice was optional, Coach Flatt believed, in light of that telephone call, that all of the students who received the Letters should again be contacted and informed that they should not participate in spring practice if it conflicted with activities at their respective middle schools. Flatt Affidavit, ¶ 23; and Local Rule Response, ¶ 86.

Coach Flatt chose to telephone the students because there was not enough time before the start of spring practice to send another letter. Flatt Affidavit, ¶ 24; and Local Rule Response, ¶ 87.

On July 29, 1997, Brentwood Academy was notified by letter from Defendant Carter that the TSSAA had found Brentwood Academy guilty of six violations of TSSAA Rules. Complaint (Docket No. 1), Ex. A. Specifically, as it relates to the issues before this Court, the TSSAA found that Brentwood Academy violated the Recruiting Rule through

the provision of free game tickets and the football Spring Practice Letter and telephone calls; and violated the Off-Season Practice Rule through the basketball practices mentioned above. Id.

As punishment for these violations, TSSAA imposed the following penalties: (1) Brentwood Academy would not be permitted any off-season practice in football or basketball for two years; (2) Brentwood Academy was placed on probation for two years and fined $3,000; (3) no Brentwood Academy athletic team would be permitted to enter the tournament series for 1997-98, and the football and boys' basketball teams would not be permitted to enter the playoffs and tournament series for 1998-99; and (4) the middle-school students who were given free game tickets were declared ineligible to participate in athletics at Brentwood Academy at any level. Id.

Brentwood Academy appealed this imposition of sanctions in compliance with a two-step appellate procedure set forth in Article VI of the TSSAA Constitution. Complaint, ¶ 82; Answer, ¶ 82. The first appeal was held on August 13, 1997, before Defendant Carter and an advisory committee comprised of three members of the TSSAA Board of Control. Id.; Local Rule Response, ¶ 92.

Defendant Carter was solely responsible for deciding the appeal. Complaint, ¶ 83; Answer, ¶ 83; and Local Rule Response, ¶ 93. Although Defendant Carter was free to consult with the three board members who were present, he was not bound by their advice. Complaint, ¶ 83; Answer, ¶ 83; and Local Rule Response, ¶ 94.

As a result of this procedure, TSSAA changed the penalties as follows: (1) one of the four middle-school students was deemed eligible to participate in Brentwood

Academy sports at all levels; the three others were deemed eligible to participate at the junior varsity level only; (2) Brentwood Academy was placed on probation for four years, and the football and boys' basketball teams were denied the privilege of participating in the playoffs and tournament series for the 1997-98 and 1998-99 school years and forbidden from sharing in the tournament revenues or expense allotments for the 1999-2000 school year; (3) all other Brentwood Academy sports teams were allowed to participate in tournament series games, but they could not share in the tournament revenues or receive any expense allotments from the state tournament series; (4) Brentwood Academy was not permitted any off-season practice in football and basketball for two years; and (5) administrative personnel of Brentwood Academy were required to meet with Defendant Carter to review all policies and procedures in regard to the athletic program. August 14, 1997 letter from Defendant Carter to Bill Brown, Headmaster, Complaint (Docket No. 1), Ex. D.

Under TSSAA procedures, Brentwood Academy next appealed to the full Board of Control at a hearing held on August 23, 1997. Combined Stipulations, ¶ 42; Local Rule Response, ¶ 97. All of the voting board members who participated in the Brentwood Academy hearings are principals of public high schools; none are principals at independent or parochial schools. Combined Stipulations, ¶ 15; Local Rule Response, ¶ 99.

Defendant Carter was present during the Board of Control's deliberation process. Docket No. 31, Ex. O, p. 15; and Local Rule Response, ¶ 101. Defendant Carter answered questions from members of the Board of Control during the deliberation process. Docket No. 31, Ex. O, pp. 15-16; and Local Rule Response, ¶ 102.

The Board of Control found three violations of TSSAA rules: (1) student-athletes being admitted free of charge to athletic contests; (2) contact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools;[1] and (3) Brentwood Academy coaches conducting impermissible off-season practice with Brentwood Academy student-athletes. Letter of August 23, 1997, from Mike Reed to Bill Brown, Headmaster, Complaint (Docket No. 1), Ex. G.

The Board of Control ultimately imposed the following penalties on Brentwood Academy:

1. The entire athletic program of Brentwood Academy was put on probation for four years.

2. Brentwood Academy's football and boy's basketball programs were suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy was fined $3,000.

4. Brentwood Academy's football and boys' basketball programs were not permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy were to meet with the TSSAA Executive Director to develop an administrative control plan to help guard against future problems.

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[1] TSSAA has stated that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls. Combined Stipulations, ¶ 40.

Complaint, ¶ 89; Answer, ¶ 89; and Local Rule Response, ¶ 103. These penalties were not itemized by type of violation in the final decision of the TSSAA against Brentwood Academy. Id.

Brentwood Academy filed this action on December 12, 1997. On June 1, 1998, Brentwood Academy moved for partial summary judgment and for a permanent injunction, contending that the Recruiting Rule violates Plaintiff's First Amendment free speech rights and Plaintiff's Fourteenth Amendment substantive due process rights and that Article VI of the TSSAA Constitution, as applied in the disciplinary proceeding herein, violates Plaintiff's Fourteenth Amendment procedural due process rights. See Docket No. 27. On June 30, 1998, Defendants moved for summary judgment, contending that they are entitled to judgment as a matter of law on Plaintiff's constitutional and state law claims. See Docket No. 47. The antitrust claim (Count IV) is not the subject of these dispositive motions.

Additional facts are discussed below as necessary.

III. Summary Judgment

As provided in Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202, 211 (1986). Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. Id. at 255, 106 S.Ct. at 2513-14, 91 L.Ed.2d at 216.

The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); Street v. J. C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

The Supreme Court concluded in Anderson that a dispute about a material fact is "genuine" within the meaning of Rule 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 252, 106 S.Ct. at 2510, 91 L.Ed.2d at 211-12. Since the preponderance of the evidence standard is used in this determination, more than a mere scintilla of evidence in support of the non-moving party's position is required. Id. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Once a motion for summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." Davidson & Jones Dev. Co., Inc. v. Elmore Dev. Co., 921 F.2d 1343, 1349 (6th Cir. 1991). The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274; Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989). While the disputed issue does not have to be resolved conclusively in favor of the non-moving party to defeat summary judgment, "sufficient evidence supporting the claimed factual dispute" must be shown, thereby requiring resolution of the parties' differing versions of the truth by a jury or judge. Anderson, 477 U.S. at 249, 106 S.Ct. at 2510, 91 L.Ed.2d at 212; First Nat'l Bank of Arizona

v. Cities Serv. Co., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569, 592 (1968).

IV. State Action

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 ("Section 1983") for alleged violation of Plaintiff's constitutional rights. Under Section 1983, a plaintiff must allege that he was deprived of a right secured by the U.S. Constitution or laws by a person acting under color of state law. 42 U.S.C. § 1983. Section 1983 erects no shield against merely private conduct, however discriminatory or wrongful. Mineo v. Transp. Mgmt. of Tenn., Inc., 694 F.Supp. 417, 423 (M.D. Tenn. 1988).

Thus, the initial question for the Court is whether the Defendants TSSAA and Carter are "state actors" subject to constitutional limitations under Section 1983. The Court finds that the TSSAA and Carter act under color of state law.[2]

The district courts in Tennessee have consistently held that the TSSAA acts under color of state law. In Kelly v. Metropolitan County Bd. of Educ. of Nashville and Davidson County, 293 F.Supp. 485, 491 (M.D. Tenn. 1968), this Court held that TSSAA was subject to the constitutional limitations placed upon state action. Citing comparable cases in Louisiana and Oklahoma, Judge Miller noted:

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[2] The parties have stipulated that Defendant Carter is the Executive Director of TSSAA and, at all times relevant to this action, acted as an employee and agent of TSSAA and within the scope of his authority as an employee and agent. Combined Stipulations (Docket No. 24), ¶ 11.

> The TSSAA was organized for the primary purpose of performing a public function. Its stated objective is to "stimulate and regulate the athletic relations of the secondary schools of Tennessee." The vast majority of the schools belonging to the association are public schools constituting a part of the State's secondary school system.
>
> The Association's Board of Control and Legislative Council must be composed of school principals or superintendents. While the Executive Secretary of the association is not an employee of the State Board of Education, his salary and the other expenses of the association are paid from revenues primarily derived from games between member schools. Many of the games are played in state-owned buildings or on state-owned properties, and by the use of state-owned facilities.

Id. The factors cited in Kelly are also present in this case.

In another decision of this Court, Crocker v. Tennessee Secondary Schools Athletic Ass'n, 735 F.Supp. 753 (M.D. Tenn. 1990), aff'd, 908 F.2d 972 and 973 (Table) (6th Cir. 1990), Judge Nixon held that the TSSAA was a state actor for two reasons: (1) the State delegated to TSSAA its authority to regulate the eligibility of the public high school student to participate in interscholastic athletics and recognized TSSAA as the only organization to supervise and regulate athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis; and (2) the composition of TSSAA's membership and leadership demonstrates that it is a state actor. Id., p. 759. The delegation of authority referenced in Crocker was evidenced by a rule of the Tennessee State Board of Education. Crocker, 735 F.Supp. at 759 (citing

Tennessee Board of Education, Rules, Regulation and Minimum Standards, 0520-1-2-.26(l)).

In Graham v. Tennessee Secondary School Athletic Ass'n, 1995 WL 115890 (E.D. Tenn. 1995), appeal dismissed (mootness), 107 F.3d 870 (Table), 1997 WL 76958 (6th Cir. 1997), Judge Edgar found that the TSSAA was a "state actor" for purposes of Section 1983, under the "state compulsion test," set forth by the U.S. Supreme Court in Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). That test requires that the State must exercise some coercive power or provide such "significant encouragement," either overt or covert, that the choice of the private actor is deemed to be that of the state as a matter of law. Id., 457 U.S. at 1004, 102 S.Ct. at 2786.

Judge Edgar found that the TSSAA met this test for two reasons. First, noting that the State had delegated its authority to regulate eligibility of high school students to participate in interscholastic athletics to TSSAA,[3] the court held that the rules and regulations promulgated by TSSAA and their enforcement by TSSAA are "fairly attributable" to the State of Tennessee. Graham, p. *5. Second, the court found that the composition of TSSAA's membership demonstrates that it is acting under color of state law: "TSSAA includes among its membership every public high school in Tennessee. The Legislative Council and the Board of Control of TSSAA are composed of the principals of public schools. Thus, state employees, the public school principals, have some direct control over the development and implementation of TSSAA rules and regulations." Id., p. * 5. The court also noted that even though TSSAA argued

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[3] The court relied upon the same State Board of Education Rule cited in Crocker.

it did not receive any revenues directly from the State, it actually received the majority of its revenues from membership fees paid by public schools and from gate receipts at certain games between member schools, many of which are held in state-owned facilities. Id., p. * 6. These same factors are present in this case.

Defendants argue that Graham and Crocker do not apply because the State no longer "delegates" its authority to the TSSAA. Citing an amendment to the State Board of Education rule relied upon in those cases, Defendants argue that the State now merely authorizes the public schools to voluntarily maintain membership in the TSSAA. See Tennessee Board of Education, Rule 0520-1-2-.08.

A review of the history of the relationship between TSSAA and the State is informative. Since 1925, the State Board of Education has recognized the functions of the TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools in Tennessee. Affidavit of Jerome V. Sailors (Docket No. 52), p. 2. In 1972, the State Board of Education, by rule, designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08). The authority granted expressly was to remain in effect until revoked. Id.[4] The TSSAA claims that authority was revoked in April of 1995, when the State Board of Education changed its rule. Even if that interpretation is true, however, for at least twenty-four

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[4] The State Board also determined that the Chairman of the State Board of Education "shall designate" a person or persons to serve in an ex-officio capacity on the TSSAA Board of Control and Legislative Council. Docket No. 52, p. 2.

years, the State expressly designated authority to TSSAA to regulate interscholastic athletics in the public schools.

Despite Defendants' bold statements to the contrary, clearly the State Board of Education has reviewed and approved rules and regulations of the TSSAA since at least 1972. The rule promulgated by the Board in 1972 stated: "The State Board of Education approves the current rules and regulations as stated in the Official Handbook of the Tennessee Secondary School Athletic Association and reserves the right to review the appropriateness of any future changes." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08). Based upon Defendant Carter's "history" of the Recruiting Rule at issue in this case [see Docket No. 51 (Affidavit of Ronnie Carter)], it is apparent that the Recruiting Rule was included in the rules and regulations approved by the State Board.

In 1984, the TSSAA briefed the State Board of Education on TSSAA goals, purposes and procedures. See Docket No. 66 (Affidavit of Gary Nixon), attachment, p. 10. Subsequent minutes of the State Board of Education meeting of May 27, 1988, state:

> In 1984 the Board delegated to TSSAA the authority to promulgate rules relative to secondary school athletic events. That action called for a periodic review and approval of the operational authority delegated to TSSAA. The staff of the State Board of Education conducted the review and recommended that the TSSAA rules be approved and the TSSAA be designated to continue as the agency to govern secondary athletics for the Board.

Id., pp. 24-25.

On the agenda for the May 26, 1989 meeting of the State Board was the "annual review and report on Tennessee Secondary Schools Athletic Association Rules." Id., pp. 28, 30 and 34. On May 31, 1991, the Board approved the rules and regulations of the TSSAA, including the Recruiting Rule. Id., p. 38, 52-53. A memo from then-Executive Director Brent Poulton to Board members concerning that May 31, 1991 meeting states: "In effect, this amounts to reaffirmation of the Board's decision to delegate responsibility for management of secondary school athletics to TSSAA." Id., p. 44.

The State Board of Education again approved the rules and regulations of the TSSAA, as late as its March 27, 1992 meeting, where the TSSAA appeared through its Associate Executive Director, Bob Baldridge, provided a report to the Board, and reviewed the current status of the TSSAA rules and regulations. Id., p. 88. Upon motion, the TSSAA rules were adopted and approved by the State Board of Education unanimously. Id., pp. 73-74, 76-78, 82, and 88. Again, the State approval included the Recruiting Rule.

In his memorandum to Board members concerning this March 27, 1992 meeting, then-Executive Director Poulton stated: "This is somewhat ceremonial, though important as a means of reminding the world that the TSSAA works as an agent on behalf of the State Board of Education." Id., p. 82 (emphasis added).[5]

In his memorandum to State Board members regarding their May 21, 1993 meeting, then-Executive Director Poulton stated: "Competitive athletics is a big part of the high school

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[5] The Court strongly disagrees that the vote of a state entity acknowledging that another body is its "agent" is "ceremonial." In any event, it is state action.

experience. The Tennessee Secondary Schools Athletic Association (TSSAA) manages these activities as sanctioned by the State Board of Education. This annual report keeps members informed of issues and changes in TSSAA policies." Id., p. 117.

It is disingenuous, at best, for Defendants to repeatedly state in their briefs, based upon testimony of Defendant Carter, TSSAA Executive Director, and Mr. Sailors, State Board of Education Executive Director, that the State has never reviewed or approved TSSAA rules. Such an assertion is utterly false, as demonstrated by the minutes of the State Board of Education.

In 1995, apparently in response to Crocker and Graham, the State Board of Education proposed and adopted an amendment to Rule 0520-1-2-.08 by deleting the existing rule and replacing it with the following: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." See Affidavit of Gary Nixon (Docket No. 66), attachment, pp. 134-37, 145, 148, 151-54, 162, 171, 173-74, 182-83.

Although the language of the rule was changed to no longer "designate" TSSAA as the official organization for supervision and regulation of secondary school athletics, it clearly singles out the TSSAA by name to serve this function. More importantly, the conduct of the parties has not materially changed. As indicated below, the connections between TSSAA and the State are still pervasive and entwined. Nothing about the function of TSSAA has

changed. Nothing about the realities of control over secondary school athletics has materially changed.

In short, the rule amendment had no material effect upon whether TSSAA is a "state actor" for purposes of Section 1983. The State of Tennessee, through custom and practice, then explicitly, and then through custom and practice again, has recognized TSSAA as the official body for the regulation and control of interscholastic athletics. A mere change in the words of the regulation, apparently to avoid a litigation claim of state action, did not change the actual conduct of the State and did not change the actual conduct of the TSSAA, which constitutes state action. To hold otherwise would raise form over substance.

The decisions in both Crocker and Graham rely upon other factors besides the "delegation" argument.[6] In both decisions, the courts noted the composition of TSSAA's membership and leadership as a basis for state action. See Crocker, 735 F.Supp. at 759; Graham, 1995 WL 115890 at ** 5-6. Nothing about the composition and leadership of TSSAA has changed since Crocker and Graham.

It is undisputed that the overwhelming majority (84%) of the members of TSSAA are public schools. Combined Stipulations (Docket No. 24), ¶ 12. Members of TSSAA must be schools accredited by the State Board of Education. TSSAA Bylaws, Art. 1, Section 1.

TSSAA is governed by a Board of Control and a Legislative Council, elected by the members. TSSAA Constitution, Arts. III and IV. In 1997, all members of the

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[6] Defendants erroneously stated at oral argument that Graham was based solely on a "designation" theory.

Board of Control and the Legislative Council were principals of public schools. Combined Stipulations, ¶ 15. Thus, the membership of the TSSAA is primarily public schools and the governance of the TSSAA is exclusively by public officials. In addition, the TSSAA admits it is the only organization providing these benefits to the public secondary schools in Tennessee.[7]

The Sixth Circuit Court of Appeals addressed the issue of state action in interscholastic athletics in Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981), where it found that "[t]he OHSAA's character as a semi-official in its activities and its symbiotic relationship with the state lead to the conclusion that the trial judge correctly found state action." Id., p. 653. The court cited many examples of the "symbiotic relationship" between the OHSAA and the state, including the OHSAA's organization of competitions, setting of schedules, arrangement of places to play tournament games, prescription of uniform rules of play, and power to sanction schools which violate those rules. Id. In addition, the court noted that to be a member of OHSAA, a school must be accredited by the State Board of Education and that membership in OHSAA is a virtual necessity, since the State Board does not provide any interscholastic athletic programs. Id. The same indications of a symbiotic relationship exist in this case.

After Yellow Springs, in Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986), the Sixth Circuit held that the National Collegiate Athletic Association ("NCAA") was not a state actor. Specifically, the court held that the NCAA conduct was not traditionally and exclusively

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[7] TSSAA made this admission at oral argument.

the state's prerogative and that the state did not cause, control or direct the NCAA's action. Id., p. 958. The Court finds significant the fact that Graham involved the NCAA, a national athletic association, and not a state association.

The Supreme Court, in holding that a national athletic association (the NCAA) was not a "state actor," specifically noted: "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 194, n. 13, 109 S.Ct. 454, 463, n. 13, 102 L.Ed.2d 469 (1988) (citing Clark v. Arizona Interscholastic Assn, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818, 104 S.Ct. 79, 78 L.Ed.2d 90 (1983) and Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968)).

This Court agrees with the analysis in Tarkanian. Thus, Defendants' reliance upon cases involving the NCAA is misplaced. In Brewer v. Purvis, 816 F.Supp. 1560, 1575 (M.D. Ga. 1993), aff'd, 44 F.3d 1008 (11th Cir. 1995), cert. denied, 514 U.S. 1111, 115 S.Ct. 1965, 131 L.Ed.2d 855 (1995), the court held that the Georgia High School Association and its employee were state actors for purposes of the Fourteenth Amendment, noting that "[t]raditionally, courts have found that high school athletic associations are state actors." The court distinguished Tarkanian because it involved the NCAA, specifically noting footnote 13 in that case, and stated: "Thus, an athletic association whose membership is predominated by institutions created by the same sovereign is a state actor." Id. Also distinguishing Tarkanian on that same basis are Habetz v. Louisiana High School Athletic Ass'n, 915 F.2d 164, 166-67 (5th Cir. 1990) and Libby v. South Inter-Conference Ass'n, 728 F.Supp. 504 (N.D. Ill. 1990), aff'd., 921 F.2d 96 (7th Cir. 1990).

In 1989, the Sixth Circuit, relying exclusively upon Graham v. NCAA, held that the Ohio High School Athletic Association ("OHSAA") did not act under color of state law. Burrows v. Ohio High School Athletic Ass'n, 891 F.2d 122 (6th Cir 1989). The Burrows court relied upon a case involving a national association, not a state association, and the opinion does not mention Tarkanian or Yellow Springs[8] at all. The Court finds that Burrows does not dictate the outcome of this case based on the facts presented here.[9]

In Clark and St. Augustine, the cases cited by the Supreme Court in Tarkanian, the courts listed numerous factors which indicated that the association's functions were "intertwined" with the state's actions: (1) composition of the association's membership primarily public schools; (2) public school principals — state officers, state paid and state supervised — comprise association leadership and play substantial role in determining and enforcing policies and regulations; (3) association funds come largely from public athletic events, the great majority of which are held at state-owned and state-supplied facilities; (4) paid staff of association covered by state retirement plan; (5) association exercises wide control over scheduling, participation in and

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[8] This omission is significant since the court had earlier held, in Yellow Springs, that the same athletic association (OHSAA) was a state actor. There is no explanation for the apparent conflict with the previous decision.

[9] In Graham v. TSSAA, Judge Edgar distinguished Burrows by citing the Tennessee Board of Education's greater involvement in the association's affairs. Graham, p. * 5. This Court agrees. See also Rhodes v. Ohio High School Athletic Ass'n, 939 F.Supp. 584, 590-91 (N.D. Ohio 1996), in which an Ohio district court, after Burrows, held that the OHSAA was a state actor, and Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994), also decided after Burrows.

conduct of athletic events of public schools; (6) association sets and enforces eligibility rules and limits numbers of games public schools may play; (7) association has power to keep public schools from competing against other schools; (8) association has power to investigate, discipline and punish member schools; and (9) rules and regulations of association bind all public schools, although any school may withdraw from association at any time. See Clark, 695 F.2d at 1128 and St. Augustine, 396 F.2d at 227-228.[10] Almost identical factors are present in this case.

The Court finds overwhelming evidence of the symbiotic relationship between TSSAA and the public, state-controlled school system in this case. For example, the stated purpose of TSSAA is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Section 2. TSSAA exercises wide control over scheduling, participation in and conduct of athletic events in public schools. TSSAA Bylaws, Arts. I, II, III and IV. TSSAA prescribes uniform rules of play. Id., Art. III, Section 8. TSSAA regulates the eligibility of public school students to participate in interscholastic athletics. Id., Art. II. TSSAA admits it is the only organization providing these benefits to the public schools of Tennessee.

Officials for athletic contests at TSSAA schools must be selected from the official TSSAA list and paid TSSAA-set fees. TSSAA Bylaws, Art. IV, and Docket No. 68, Exhibit A (June 11-12, 1997 TSSAA minutes). The TSSAA also

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[10] In Poret v. Louisiana High School Athletic Ass'n, 1996 WL 169241 (E.D. La. 1996), the court, noting the "new test" of Blum, found that, even under a "fairly attributable" standard, St. Augustine (cited above) is still controlling and the LHSAA is a state actor for purposes of Section 1983. Id., p. * 2 (citing Graham and Crocker).

sets the ticket prices for all regional and state tournament games. Id.

The TSSAA has the power to investigate and sanction schools which violate its rules. TSSAA Bylaws, Art. 1, Section 6. Thus, public schools, state agencies, are subject to TSSAA discipline. TSSAA can levy monetary fines against the public schools of Tennessee.

In addition, the TSSAA has the power to keep schools from competing against other schools. Id., Art. III. Its rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics.

TSSAA rules provide that public school principals and coaches submit certain reports to the association on a regular basis. TSSAA Bylaws, Arts. III and IV. In fact, the TSSAA Bylaws provide that principals — state-paid, state-supervised, public officials — are responsible to the association in all matters pertaining to athletic relations of their schools.[11] Id., Art. III, Section 8. State employees, therefore, are accountable to the TSSAA. Initial responsibility for assuring compliance with all TSSAA rules and regulations is placed in the hands of the principals. Id., Art. III, Section 9 and Art. IV, Section 8.

A substantial portion of TSSAA's annual revenue comes from tournament receipts from athletic tournaments of member schools. TSSAA Bylaws, Art. III, Section 17; Local Rule Response (Docket No. 46), ¶ 24. The majority of athletic contests between member schools are played in public, state-owned facilities. Id., ¶ 25. The TSSAA directly

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[11] Although unnecessary to the decision in this case, this regulation, on its face, raises conflict of interest concerns.

dictates the parameters of all post-season play for public schools. TSSAA Bylaws, Art. III.

Employees of TSSAA, including Defendant Carter, are covered by the State retirement system and, by statute, are included in the definition of "teachers" for that purpose. Tenn. Code Ann. § 8-35-118; Local Rule Response, ¶ 21.

For a school to be member of TSSAA, its coach must have a Tennessee State teaching license, must be a full-time employee of the Board of Education and must be paid entirely from funds approved by the Board of Education or the governing board of the school. TSSAA Bylaws, Art. III, Section 7.

TSSAA admits that interscholastic athletics are intricately connected to the educational process. For example, the Executive Director of TSSAA stated, in a letter to Plaintiff: "High school athletics is a part of the total educational program." See Ex. D to Docket No. 24. In addition, the first Article of the TSSAA Constitution provides:

> Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate the athletic and scholastic programs. The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

TSSAA Constitution, Art. 1, Section 2.

By state law, participation in interscholastic athletics and marching band may be substituted for the physical education graduation requirement. Tenn. Bd. of Education Rule 0520-1-3-.06. Thus, students get academic credit for TSSAA activities, and the TSSAA is therefore performing part of a public function, required by state law, as the court in Kelly found.

On July 29, 1994, Defendant Carter, Executive Director of TSSAA, appeared at a State Board of Education meeting, on behalf of TSSAA, to answer questions about TSSAA's lack of minority hiring. See Docket No. 66, attachment, p. 111. The minutes reflect the State Board's "overall concern that TSSAA reflect hiring practices which are the same as those expected for local schools." Id., p. 112. At the September 29, 1994 meeting, Bob Baldridge, Associate Executive Director for TSSAA, appeared again to update the Board on TSSAA's employment practices. Id., p. 128. Thus, the State Board of Education injected itself into the TSSAA's hiring practices as late as 1994.

The TSSAA connection to the State Board of Education is further demonstrated by the fact that the TSSAA treated all Board members to dinner and helped with the expenses of the Board's July 1991 retreat. See Docket No. 66, attachment, pp. 63 and 69.

Mr. Sailors stated in his Affidavit that "no member of the State Board of Education attends meetings either of the TSSAA Board of Control or Legislative Council." Docket No. 52, p. 3. Yet minutes of the TSSAA Board of Control and Legislative Council meetings reveal that statement to be utterly false, since State Board representatives, including Mr. Sailors himself, attended more than twenty TSSAA Board of Control or Legislative Council meetings from 1990 through 1997. See Exhibit A to Docket No. 68.

The minutes of the June 8, 1990 Board of Control meeting reveal that the State Board of Education representative is, in fact, an ex-officio member of the Board of Control. Id.; see also Docket No. 52, p. 2. Therefore, TSSAA cannot argue that representatives of the State attended these meetings simply as members of the public. Those minutes state the following: "At the present time, there are three ex-officio members serving on the Board of Control and Legislative Council. They are representatives of the State Board of Education, the State Schools Boards Association, and the State Department of Education." Docket No. 68, Ex. A. So, not only is the State Board of Education represented on the TSSAA Board of Control and Legislative Council; the State Department of Education is represented within the governance of TSSAA as well. It is also significant that State representatives continued to attend TSSAA meetings as ex-officio members even after the "delegation" rule was changed in 1995. Docket No. 68, Ex. A.

Therefore, regardless of how the TSSAA denominates itself as an organization, or how it characterizes its relationship with its member schools, "it is abundantly clear that the association's very existence is entirely dependent upon the absolute cooperation and support of the public school systems" of the State of Tennessee. Haas v. South Bend Community School Corp., 289 N.E.2d 495, 498 (Ind. 1972) ("The enforcement of the rules promulgated by the IHSAA and adopted by the member schools may have a substantial impact upon the rights of students enrolled in these tax supported institutions, and we conclude, therefore, that the administration of interscholastic athletics by the IHSAA should be considered to be 'state action' within the meaning of the Fourteenth Amendment.").

The supervision and regulation of interscholastic athletics in secondary schools in Tennessee is provided by the TSSAA, in joint participation with the State. Certainly the conduct of the TSSAA and the State meet the "significant encouragement" and "fairly attributable" tests of Blum.

As the court noted in Barnhorst v. Missouri State High School Activities Ass'n, 504 F.Supp. 449 (W.D. Mo. 1980):

> It is beyond cavil that education is a traditional function of the state. . . . Extracurricular activities are an important component of an education in today's modern society. The close identification of the functions served by MSHSAA with the State's provision of education to all children of school age (not otherwise receiving a private or parochial education) is a sufficient nexus to transmute the challenged rule of MSHSAA into "state action" subject to the constitutional strictures of the Fourteenth Amendment of the United States Constitution.

Id., p. 457.

The close identification of the TSSAA with the State's provision of education is a sufficient nexus to find state action in this case. Accordingly, the Court finds that the actions of the TSSAA, a state athletic association, are so intertwined with the State that they constitute "state action" for purposes of Section 1983. See also Clark, 695 F.2d at 1128; Dennin v. Connecticut Interscholastic Athletic Conf., Inc., 913 F.Supp. 663, 671 (D. Conn. 1996), judgment vacated on other grounds (mootness), 94 F.3d 96 (2d Cir. 1996); Force v. Pierce City R-VI School Dist., 570 F.Supp. 1020, 1030 (W.D. Mo. 1983); Beck v. Missouri State High School Activities Ass'n, 837 F.Supp. 998, 1001 (E.D. Mo.

1993), judgment vacated on other grounds (mootness), 18 F.3d 604 (8th Cir. 1994); Mississippi High School Activities Ass'n. Inc. v. Coleman, 631 So.2d 768, 774 (Miss. 1994).

V. First Amendment Freedom of Speech

A.

Brentwood Academy contends that the TSSAA Recruiting Rule violates its First Amendment right of freedom of speech. Plaintiff, in particular, emphasizes that by prohibiting school representatives from contacting a student before the student has attended the representative's school for three days, the Recruiting Rule violates the First Amendment on its face, and as applied in this case. Defendants contend that the Rule is a valid time, place and manner restriction. For the reasons described herein, the Court finds that the TSSAA Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy.

The Recruiting Rule appears at Article II, Section 21 of the TSSAA By-Laws, and consists of the "main" Rule, followed by five sets of questions and answers, and "Guidelines For Understanding The 'Recruiting Rule' and Understanding 'What is Undue Influence.'" The main Rule prohibits the use of "undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes."

In answer to Question 1, the phrase "undue influence" is defined as: "exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record." The phrase "appropriate or normal" is not defined in the Rule.

The answer to Question 3 following the Rule attempts to specifically regulate the conduct of coaches. It provides that a "coach may not contact a student or his or her parents prior to his enrollment in the school." The prohibition applies "whether or not [the student has] an athletic record."

"Contact" is not defined in the answer to Question 3, or anywhere else in the Rule. In that regard, paragraph six of the Guidelines provides that "[a]ny meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school." It is not clear whether a member of the coaching staff may "contact" a student who has, at some time prior to enrollment, requested to speak with him or her. See Deposition of Robert Lee Baldridge, III, at 81-83 (attachment to Docket No. 80) (coach may talk with student if student has requested to talk with coach).[12]

"Enrolled" is also undefined in the answer to Question 3. The term is used again, however, in the second example in the answer to Question 4, which prohibits: "Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school) . . ." The TSSAA has taken the position that this sentence clearly indicates that the term "enrollment," as it is used throughout the Rule and explanations, requires that the

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[12] Indeed, TSSAA Assistant Executive Director Robert Baldridge has testified that a member school does not violate the Rule by sending letters to, or calling, students who have made an "initial contact" with the school — a position contrary to the one taken by the TSSAA in penalizing Plaintiff for sending the Spring Practice Letter and calling students who had already signed enrollment contracts with the school. (Baldridge Deposition, at 83-84).

student have attended at least three days of school. (Defendants' Response To Motion For Partial Summary Judgment, at 95-96 (Docket No. 45)). Based on this interpretation by the TSSAA, the restriction under Question 3 prohibits a coach from "contacting" *any* student or parent until that student has attended the coach's school for three days.

Other explanations following the Rule specifically prohibit "initial contact or prearranged contact" by coaches or other representatives of the school with "prospective student/athletes." Specifically, three examples under Question 4 prohibit:

> 3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.
>
> 4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.
>
> Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.
>
> Private or parochial schools may not contact students enrolled at the public schools. Public

schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

"Feeder pattern" is not defined in the Rule, but the parties have stipulated that the Plaintiff has no schools in its feeder pattern. (Defendants' Local Rule 8(b)(7)(c) Response, ¶ 37(Docket No. 46)). [13] Based on these examples, any school representative, including a member of the coaching staff, is prohibited from making an "initial contact" with prospective student-athletes outside the "feeder" pattern for any reason until the student is enrolled at the school.

Plaintiff contends these restrictions on contact by schools violate the First Amendment.

B.

The principle underlying the Supreme Court's First Amendment jurisprudence is that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 114 S.Ct. 2445, 2458, 129

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[13] Defendants suggest that the coach at Brentwood Academy can take advantage of the feeder school exception by talking with students who are in the first through sixth grade at the school. But Defendants have not suggested why they should be allowed to withdraw their stipulation. In any event, no reasonable person would interpret the term "feeder school" to mean the first six grades of the *same* school.

L.Ed.2d 497 (1994). Laws and regulations that "stifle [] speech on account of its message . . . pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." Id. These restrictions "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" Id. (quoting Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991)).

Laws that regulate the content of the message in this way are subjected to the "most exacting scrutiny." Turner Broadcasting, 114 S.Ct. at 2459. To judge those laws, the government must show that they serve a compelling interest, and are narrowly drawn. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987); First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). To be "narrowly drawn," the law must be the "least restrictive means" to further the government's articulated interest. Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

Defendants contend that the Recruiting Rule's prohibition on contact with prospective students is not an attempt to stifle speech, but is a valid time, place and manner restriction. In order to be analyzed as a time, place, and manner restriction, the regulation must be content-neutral. Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). If the regulation is content-neutral, it is subject to "intermediate" scrutiny: it must be narrowly tailored to serve a significant governmental interest, and it must leave open ample alternative channels

for communication of the information. Id. The means chosen need not be the least restrictive, but may not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 109 S.Ct. at 2757-58.

In determining whether a regulation is content-neutral, the "government's purpose is the controlling consideration." Ward, 109 S.Ct. at 2754. A regulation that serves purposes unrelated to the content of the message is deemed content-neutral, even if it has an incidental effect on certain messages or speakers. Id. For example, a government may regulate the level of noise emitted by a sound truck, without regard to the message conveyed by the sound truck, to further its interest in protecting citizens from unwelcome noise. 109 S.Ct. at 2756-57. If the interest to be served by the regulation is based on the listeners' reaction to the speech, however, the purpose of the regulation is not content-neutral. Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992). The Court finds that the Recruiting Rule ban is content-based because the interests asserted by the Defendants to support the ban focus on the content of the message and the effect of the message on the listener.

C.

Defendants assert two interests supporting enactment of the Recruiting Rule: ensuring that athletes and non-athletes are treated alike; and preventing the exercise of undue influence on the student-athlete. (Defendant's Response To Motion For Partial Summary Judgment, at 73-75, 79 (Docket No. 45)). Thus, in enacting the ban, the TSSAA was apparently concerned that schools would be more interested in attracting student-athletes than other students, and consequently, school representatives would attempt to

"unduly" influence these student-athletes to attend. Thus, the ban was purportedly enacted to prevent student-athletes from being subjected to the content of the message being conveyed by public and private school representatives outside the student's feeder pattern. The TSSAA's purpose in enacting the ban, then, indicates that the ban is not content-neutral.[14] Thus, Defendants must show that the ban is supported by a compelling governmental interest and is narrowly drawn. Arkansas Writers' Project, Inc., 107 S.Ct. at 1729; Bellotti, 98 S.Ct. at 1421.

The Court recognizes that the State has a compelling interest in ensuring that its children obtain a high quality education so that they may become productive, contributing members of society. That education may include a curriculum that exposes the student to a wide variety of academic subjects, interscholastic athletics, and extracurricular activities.[15] Ensuring that students maintain an appropriate balance between these activities and their "core" academic work is also a legitimate interest of the government. To that extent, the first interest asserted by Defendants has superficial appeal.

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[14] Even if the ban were content-neutral, it still would not be a valid time, place, and manner restriction because, as discussed more fully below, the ban burdens substantially more speech than is necessary to prevent harm to student-athletes. See also Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 1801, 123 L.Ed.2d 543 (1993) ("Assuming that a flat ban on commercial solicitation could be regarded as a content-neutral time, place, or manner restriction on speech, a proposition that is open to serious doubt," the ban does not "serve a substantial state interest in 'a direct and effective way.'" (citations omitted)).

[15] Students may receive academic credit for interscholastic athletics. Tenn. Bd. of Ed. Rule 0520-1-3-.06.

That interest is referenced in the Guidelines which follow the Recruiting Rule:

> 2. One key is not treating 'athletes' or 'prospective athletes' any differently than students who are not athletes.
>
> 3. Students should be seen as students and not singled out based on their potential athletic ability . . .
>
> * * *
>
> 7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year-old students in the same manner as college coaches view high school seniors.
>
> 8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

To the extent that singling out a student based on his or her athletic ability would harm that student,[16] the State would have an interest in preventing that harm from occurring. Certainly, the State would have an interest in preventing a

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[16] There is no evidence in the record to support the conclusion that singling out students based on their school activities is harmful. Singling out talented student-athletes may well be beneficial rather than harmful.

student's athletic abilities or activities from resulting in an unfair advantage or an unfair disadvantage to the student. Both situations could affect the student's ability to benefit fully from his education.[17] Thus, to the extent that Defendants are asserting an interest in ensuring that athletics do not interfere with a student-athlete's ability to obtain a high quality education, they have asserted a compelling state interest.

Defendants also assert that the Recruiting Rule ban is designed to prevent "undue influence." Under Tennessee law, a plaintiff who seeks to invalidate a will based on undue influence on the testator must show "that one person, by threats, coercion or importunities, so exhausted the will of the other person to resist that the act taken by the weaker was not his or her own act but that of the person exercising the undue influence." Bills v. Lindsay, 909 S.W.2d 434, 440 (Tenn. Ct. App. 1993). A similar showing must be made to rescind a conveyance or a contract. See, e.g., Fritts v. Abbott, 938 S.W.2d 420, 421 (Tenn. Ct. App. 1996) (plaintiff must show that the weaker party made the conveyance while under the domination and control of the stronger party). Limited by these definitions, the Court agrees that the prevention of "undue influence" on a student is a valid state interest because conduct constituting "undue influence" could harm the student. In other words, the TSSAA has a substantial

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[17] The Court is not persuaded, however, that the State would have an interest in ensuring that students with certain talents are treated exactly the same as every other student. Pursuing this goal to its logical extreme would prevent schools from allowing talented orators to participate on the debate team, or from allowing talented musicians to play in the school band. By offering these extracurricular activities, the State has recognized that developing a student's particular talent enhances the quality of that student's educational experience.

interest in preventing a student from being threatened, coerced, or harassed.

On the other hand, the TSSAA does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school.[18] In other words, it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side of the debate by suppressing the speech of the other. Turner, 114 S.Ct. at 2458-59; Belotti, 98 S.Ct. at 1420-21. The TSSAA cannot control school choice through censorship.

Having determined, however, that Defendants have a legitimate interest in protecting student-athletes from the specific harms identified above, the Court must determine whether the Recruiting Rule's ban is narrowly drawn to accomplish those goals. The answer is clearly no. The interests identified by Defendants are, at best, only marginally promoted by the ban, and "could be sufficiently served by measures less destructive of First Amendment interests." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980).

There is absolutely no evidence in the record that the Recruiting Rule ban was enacted in response to evidence that student-athletes were being harmed as a result of initial

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[18] The State's interest, in fact, is the reverse. The State has a profound interest in students making informed choices about education.

contact by school representatives, including the school's coaching staff. See Edenfield, 113 S.Ct. at 1800-01 (failure to present studies or anecdotal evidence substantiating State's allegations of harm belies government's argument that restriction directly and materially alleviates that harm). See also Ibanez v. Florida Dep't of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct. 2084, 2091, 129 L.Ed.2d 118 (1994) ("[w]e have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here.") It is difficult to imagine that a student-athlete would be harmed simply by hearing that a school outside his zone would be interested in him or her. It is difficult to imagine that a student-athlete who did not have the financial means to attend a private or parochial school would be harmed simply by an offer of financial aid that would allow him to attend the school.

There is also no evidence in the record that the ban prevents athletes from obtaining an "unfair" advantage over other students. In fact, the ban has the result of penalizing athletes by prohibiting them from being approached with offers of educational opportunities when schools may freely approach, and make offers to, students with other talents.[19] Student-athletes are being punished, rather than favored, for their talents.

Furthermore, Defendants have not explained the purpose for the feeder school exception. If conveying information to student-athletes about opportunities to attend out-of-zone

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[19] In that regard, the Court notes that listeners, as well as speakers, have First Amendment interests that deserve protection, interests that may be asserted by those who wish to reach those listeners. See, e.g., Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 1823 n.15, 48 L.Ed.2d 346 (1976).

schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of "feeder schools." The TSSAA cannot have it both ways.

Certainly, the TSSAA's legitimate interest in preventing harm to student-athletes can be better served by means less intrusive than the Recruiting Rule ban. For instance, fraudulent conduct and intimidation could be prohibited, and the TSSAA could require parental involvement, if necessary. See Schaumburg, 100 S.Ct. at 836-47; Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct. 2667, 2676, 101 L.Ed.2d 669 (1988). The Court agrees with Plaintiff that the Rule's ban has the effect of preventing any influence on a student, not just "undue" influence. The ban is simply not the "least restrictive means" for preventing harm to student-athletes. The TSSAA needs to go back to the drawing board and start over.

Thus, the Court concludes that the Recruiting Rule ban cannot be applied in a valid manner, and is therefore, facially unconstitutional. See, e.g., Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984).

The ban also violates the First Amendment as applied to the facts in this case because there is no evidence that penalizing the conduct at issue here even remotely furthered the legitimate interests identified above. The letter sent by Coach Flatt invited students who had already signed enrollment contracts with the school to Spring football practices, advised the students that they were not required to attend the practices, and set forth the schedule for practices. The phone calls Coach Flatt made after sending the letter were simply to reiterate to the recipients that they should not

participate in practices if their participation conflicted with activities at the schools they were currently attending.

There is no evidence in the record to suggest that these students were, or were likely to be, harmed by receiving information about Plaintiff's Spring football practice. The Spring Practice Letter, and follow-up telephone calls, could not have constituted "undue influence" of the students to attend Brentwood Academy. The students who received the letters and calls had already contractually agreed to attend the school. Whatever influence the letters and calls had was "due," rather than "undue," given the legitimate need for a school to communicate such information to its students.

Furthermore, Defendants have admitted that the Recruiting Rule does not prohibit incoming students from participating in spring football practice at a school they plan to attend the next fall.[20] Therefore, the TSSAA has prohibited speech with regard to conduct it recognizes as lawful under the regulations. Defendants have asserted no legitimate justification for penalizing Plaintiff's communication about this admittedly legal activity.

Defendants also argue that the restriction is justified because the State may specify those who are allowed to speak under certain circumstances, citing Minnesota State Board For Community Colleges v. Knight, 465 U.S. 271, 104 S.Ct 1058, 79 L.Ed.2d 299 (1984); Cornelius v. NAACP Legal Defense Ed. Fund, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); and Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74

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[20] The Court notes the absurdity of TSSAA's position that coaches cannot contact students until they attend school for three days, but these same students can attend spring practice. How can a coach hold a practice with students that he or she cannot contact?

L.Ed.2d 794 (1983). These cases do not advance the analysis here because they all involve the extent to which the government may limit access to public property, or may limit access to government officials or employees by those wishing to express their views. The ban in this case does not limit access to public property or public officials or employees. It limits access by certain speakers to certain potential listeners. Indeed, by restricting the speech of coaches, it limits the most informed speakers on the subject of athletics. As discussed above, the First Amendment is much less tolerant of the restrictions involved here. See Belloti, 98 S.Ct. at 1420. (The government is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.")

D.

Defendants also argue that even if the Rule's ban is content-based, it should be analyzed under the more relaxed scrutiny applied to "commercial speech" under the First Amendment. The Supreme Court has explained that "'the test for identifying commercial speech'" is whether the communication involves "the proposal of a commercial transaction." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 1513, 123 L.Ed.2d 99 (1993) (quoting Board of Trustees of State University of N.Y. v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

The Court is not persuaded that the ban in this case should be characterized as regulating only commercial speech. The ban is not limited to a school's advertisements and/or solicitations, but covers all speech by a school representative with a student until the student has attended the representative's school for three days. Indeed, as Plaintiff points out, the communication for which Plaintiff was

punished in this case did not involve solicitation or recruiting, but merely conveyed information about spring football practice to students who had signed enrollment contracts with the school. Furthermore, the ban also applies to coaches of public schools who seek to contact students attending schools that are not "feeder schools." Since public school students do not pay tuition, a student's enrollment in a particular public school would not constitute a"commercial" transaction. By the same token, it is not at all clear that a student's enrollment in a private school that provided a full scholarship to the student would constitute a "commercial" transaction. Thus, the Rule's ban does not limit purely commercial speech.[21]

Even if Defendants are correct in their characterization of the speech involved here, however, the ban does not survive even the more relaxed scrutiny accorded commercial speech regulations. Regulation of commercial speech is subjected to "intermediate" scrutiny under a framework set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 2375-76, 132 L.Ed.2d 541 (1995).[22] Under Central Hudson, commercial speech that concerns a lawful activity and that is not misleading may be

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[21] As the Supreme Court has pointed out, speech does not retain its commercial character "when it is inextricably intertwined with otherwise fully protected speech." Riley, 108 S.Ct. at 2677.

[22] Since Virginia Board of Pharmacy, 96 S.Ct. at 1817, the Court has held that accurate and non-misleading commercial messages are protected by the First Amendment. Only false, deceptive or misleading commercial speech may be banned. Ibanez, 114 S.Ct. at 2088.

Defendants do not contend that the ban is justified because it reaches only unprotected false, deceptive or misleading speech.

regulated if the government demonstrates that:[23] (1) it has a substantial interest in support of its regulation; (2) the restriction on commercial speech "directly and materially advances that interest;"[24] and (3) the restriction is "'narrowly drawn."[25] Florida Bar, 115 S.Ct. at 2376. Unlike rational basis review, this intermediate level of scrutiny does not

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[23] It is well established that the party seeking to uphold a restriction on protected commercial speech has the burden of justifying it. Ibanez, 114 S.Ct. at 2088 n.7. As the Supreme Court stated in Ibanez, 114 S.Ct. at 2089:

> The State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'

(quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S.Ct. 2265, 2279, 85 L.Ed.2d 652 (1985)).

[24] Under the second prong of the Central Hudson test, Defendants must show that the regulation directly and materially advances the articulated interests. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 1509, 134 L.Ed.2d 711 (1996). Defendants may not rely on speculation and conjecture in making this showing, but "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield, 113 S.Ct. at 1800-01. In that regard, the Court has explained that "broad prophylactic rules may not be so lightly justified if the protections afforded by commercial speech are to retain their force." Zauderer, 105 S.Ct. at 2281.

[25] In Fox, 109 S.Ct. at 3034-35, the Court made it clear that commercial speech analysis does not require that the regulation meet the "least restrictive means test." Instead, there must be a "fit' between the legislature's ends and the means chosen to accomplish those ends. Id. See also 44 Liquormart, 116 S.Ct. at 1509.

permit the court "to supplant the precise interests put forward by the State with other suppositions." 115 S. Ct. at 2376.

As discussed above, the Court recognizes that the State has a compelling interest in preventing conduct that is harmful to a student-athlete. Also, as explained above, however, the ban does not directly and materially advance that interest, nor is it narrowly drawn. Accordingly, even if the ban could be construed as involving commercial speech, it would still violate the First Amendment.

Defendants cite Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) to support their argument that "a prohibition on the exercise of 'undue influence' in the context of commercial speech has been upheld under the First Amendment." (Defendants' Response To Motion For Partial Summary Judgment, at 79 (Docket No. 45). In Ohralik, the Ohio Supreme Court disciplined an attorney for approaching an 18-year old accident victim in the hospital, offering to represent her, and during a later visit, obtaining her signature on a contingent fee agreement. 98 S.Ct. at 1915-16. The attorney visited another victim of the accident, also 18-years old, at home and also secured her signature on a contingent fee agreement. Id. Ohralik was disciplined for violating a rule prohibiting a lawyer from recommending himself or his associates to one who has not sought his advice, and a rule that prohibits the acceptance of employment by a lay person to whom the attorney has given unsolicited advice. 98 S.Ct. at 1917 n.9. Neither of these rules used the phrase "undue influence."

The Ohralik Court held that the State does not violate the First Amendment by disciplining a lawyer "for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." 98 S.Ct. at 1915. In reaching its decision, the Court

determined that the State had a legitimate interest in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" 98 S.Ct. at 1921.

As explained above, this Court agrees that the TSSAA has an interest in preventing students from harmful solicitations involving fraud, undue influence, intimidation or overreaching, but Defendants have not shown that the Recruiting Rule ban properly accomplishes that goal. As the Supreme Court explained in a more recent case, this goal does not justify blanket bans on all personal solicitations: "the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation." Edenfield, 113 S.Ct. at 1802. In striking down a ban on in-person solicitation by Certified Public Accountants, the Court in Edenfield made it clear that the Ohralik holding was limited: "Ohralik's holding was narrow and depended upon certain 'unique features of in-person solicitation by lawyers' that were present in the circumstances of that case." Id. (quoting Zauderer, 105 S.Ct. at 2277). The "unique features" of the in-person solicitation in Ohralik were that a lawyer, who "is trained in the art of persuasion," personally solicits an "unsophisticated, injured, or distressed lay person" and seeks the person's immediate acceptance of a retention agreement. Id.

Unlike Ohralik, there is no evidence in the record that a student's parents, who must make the ultimate decision about which school their child will attend, would be vulnerable to, and oppressed by, school representatives, or that there would be pressure to make a decision on the spot. See Edenfield, 113 S.Ct. at 1803 (". . . Ohralik in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the

preventative measure it proposes will contribute in a material way to solving that problem.")

Moreover, the facts in this case are that the Spring Practice Letter, and follow-up calls, all went to students who had already contractually agreed to attend Brentwood Academy. The students and their parents had already selected Brentwood Academy, and therefore, there was no opportunity for solicitation, much less undue influence, as in Ohralik. Accordingly, Ohralik does not support the constitutionality of the ban involved here.

E.

Even if the Recruiting Rule ban were not content-based, it would still run afoul of the First Amendment for another reason. By using the phrase "appropriate or normal" to define the already imprecise term "undue influence," the TSSAA retains unbridled discretion to penalize those expressing points of view with which it disagrees. Forsyth County, 112 S.Ct. at 2401-02.[26] Indeed, the TSSAA invoked these vague terms in finding Plaintiff in violation of the Recruiting Rule, but did not explain how the students involved were harmed. See Exhibit A to Complaint (Docket No. 1) ("This entire process [sending letters and calling those who had signed enrollment contracts] is seen as beyond what is normal and appropriate and is undue influence.")

The word "appropriate" is defined in Webster's Third New International Dictionary as "specially suitable." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 106 (1993). The word "normal" is defined as "according to,

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[26] That the TSSAA allows members to seek advice about how the Recruiting Rule will be interpreted does not eliminate the discretion it retains to apply those subjective terms in an arbitrary fashion.

constituting, or not deviating from an established norm, rule, or principle." Id. at 1540. Neither of these definitions sheds any light on how to determine an "established norm," or to whom the conduct must be "specially suitable." Nor do they add any precision to the phrase "undue influence." Accordingly, the TSSAA is free to use the Recruiting Rule to arbitrarily suppress speech in violation of the First Amendment.[27]

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[27] Because the Court has determined that the Recruiting Rule is unconstitutional by violating the First Amendment, it is unnecessary to address Plaintiff's argument that the Rule also violates its substantive due process rights under the Fourteenth Amendment because it is void for vagueness. The Court is persuaded, however, that the terms "appropriate," "normal," and "undue influence" would also be unconstitutionally vague for purposes of the Fourteenth Amendment. These terms have "no settled usage or tradition or interpretation in law." Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 2731, 115 L.Ed.2d 888 (1991). Consequently, the Rule fails to provide "fair warning" to those to whom it is directed, and is so imprecise as to present a real "danger[] of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

The Rule prohibits the use of "undue influence," and that phrase, by its very nature, requires further explanation. The TSSAA defines the phrase "undue influence" by raising and answering five sets of questions and promulgating guidelines. It is unclear if the explanations expand the scope of the Rule, or if the Rule limits the expansive prohibitions that follow it.

In any event, the first question and answer used to define "undue influence" only makes matters worse. The TSSAA defines "undue influence" as "exceeding what is appropriate or normal." The phrase "appropriate or normal" could not be more vague. The words "appropriate" and "normal" are among the most relative terms in the English language. "Appropriate" or "normal" compared to what?

These profound defects could perhaps be ameliorated if

(continued...)

F.

In summary, the Court has determined that the Recruiting Rule violates the First Amendment on its face and as applied, and that Plaintiff is entitled to summary judgment as to Count I. Defendants are hereby enjoined from any use of the Recruiting Rule.[28]

Having found the Recruiting Rule unconstitutional, all sanctions imposed by the TSSAA on Brentwood Academy pursuant to the August 23, 1997 letter from the TSSAA to Brentwood Academy (Exhibit G to Complaint (Docket

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[27] (...continued)
"appropriate or normal" was clearly defined. However, nowhere in the Rule is the phrase "appropriate or normal" defined. Any yet, to further complicate matters, the TSSAA emphasizes the importance of the "appropriate or normal" standard by stating in its "Guidelines For Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence:'"

> The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of *many* things that can exceed what is normal and appropriate.

(emphasis added). Despite this statement, a major theme of the Recruiting Rule is vagueness.

The phrase "appropriate or normal" adds nothing to the definition of "undue influence," and is essentially meaningless. This vague Rule permits the TSSAA to engage in arbitrary and discriminatory enforcement — precisely, the claim made by Brentwood Academy in this case.

[28] Thus, the Court need not address whether the Recruiting Rule violates substantive due process standards because it permits a member school to be punished for the conduct of someone unconnected with the member school.

No. 1)) are void and unenforceable. The sanctions imposed are not itemized by type of violation. Therefore, to ensure that the First Amendment is not violated, all sanctions must be set aside.

VI. Fourteenth Amendment: Procedural Due Process

Plaintiff alleges, in Count III of its Complaint, that Defendants' actions have violated Plaintiff's Fourteenth Amendment rights to procedural due process. For purposes of its Motion for Partial Summary Judgment, Plaintiff argues two specific procedural due process rights which were allegedly violated by Defendants: (1) the right to a neutral, impartial and detached decision maker and (2) the right to confront and cross-examine adverse witnesses.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Thus, the Court must first determine whether Plaintiff has been deprived of a property or liberty interest protected by the Constitution. Plaintiff asserts that it has property interests in both the fine assessed against it by Defendant and the contract rights to which it is entitled as a member of the TSSAA. Plaintiff further asserts that it has liberty interests in its reputation and opportunities for attracting students and raising funds for the school.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests — property interests — may take many forms." Id., 408 U.S. at 576, 92 S.Ct. at 2708. Property interests are not created by the Constitution. Rather they are created and

their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules of understandings that secure certain benefits and that support claims of entitlement to those benefits. Id., 408 U.S. at 577, 92 S.Ct. at 2709.

The Court finds that Plaintiff, at a minimum, has a property interest, in the $3,000 fine assessed against it by the TSSAA.[29] Accordingly, the Court need not address, at this time, Plaintiff's other asserted constitutionally-protected rights. Plaintiff was entitled to the constitutional protections of procedural due process in this case.

There are clear issues of fact, however, as to what process Plaintiff was given and whether that process was sufficient to meet the requirements of the Fourteenth Amendment. For example, there are genuine issues of material fact as to the extent of Defendant Carter's involvement and influence beyond the initial fact-finding investigation in this case. See, e.g., Plaintiff's Response to Defendants' Statement of Undisputed Facts (Docket No. 70), ¶ 9. There are genuine issues of material fact as to whether the second appeal, to the TSSAA Board of Control, was truly a de novo review. Id., ¶ 10. There are genuine issues of material fact as to whether bias or prejudgment played any part in the decision making process. Id., ¶¶ 9, 10, 15. There

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[29] See, e.g., G&G Fire Sprinklers, Inc. v. Bradshaw, 136 F.3d 587 (9th Cir. 1998) (subcontractor had due process property interest in money withheld by state); Contractors Against Unfair Taxation Instituted on New Yorkers v. City of New York, 1994 WL 455553 (S.D. N.Y. Aug. 19, 1994) (property interest in money allegedly exacted for payment of fines for traffic violations); Jones v. Cowley, 1991 WL 252667 (10th Cir. Nov. 26, 1991) ("Certainly, there is no doubt that the $15 fine is a deprivation of a property interest."); Murray v. Dosal, 1998 WL 385915 (8th Cir. July 13, 1998) (inmate has property interest in money received from outside sources).

are genuine issues of material fact as to whether Plaintiff was given meaningful opportunities for confrontation and cross-examination of adverse witnesses. Id., ¶ 11, 12; Defendants' Local Rule Response (Docket No. 46), ¶¶ 51, 95, 98.

Accordingly, Plaintiff's Motion for Partial Summary Judgment, on the issue of procedural due process, is DENIED.

VII. Defendants' Motion for Summary Judgment

Also pending before the Court is Defendants' Motion for Summary Judgment (Docket No. 47), in which Defendants seek judgment on Plaintiff's federal and state law claims, with the exception of the antitrust claims.

Defendants contend that, because they are not "state actors," they are entitled to summary judgment on Plaintiff's constitutional claims. For the reasons stated above, the Court has found that Defendants are "state actors" and, therefore, Defendants' Motion for Summary Judgment on this issue is DENIED.

In addition, Defendants argue they are entitled to summary judgment on Plaintiff's state law claims. Tnose claims are set forth in Counts V and VI of Plaintiff's Complaint (Docket No. 1).

In Count V, Plaintiff alleges a cause of action for equitable estoppel. Defendants contend that none of the acts alleged by Plaintiff are sufficient to create an equitable estoppel under Tennessee law. What both parties overlook is the fact that there is no cause of action for equitable estoppel under Tennessee law. Val-Land Farms, Inc. v. Third Nat'l Bank in Knoxville, 937 F.2d 1110, 1115 (6th Cir. 1991).

Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's purported claim of equitable estoppel (Count V) is GRANTED, and that claim is DISMISSED.

In Count VI, Plaintiff alleges a cause of action for "unfair, unreasonable, arbitrary and oppressive action" in violation of Plaintiff's rights under state law. Defendants contend that they are entitled to summary judgment on this claim because their actions with regard to Plaintiff were conducted in good faith and that the Court should not interfere with the internal affairs of a voluntary association. Whether Defendants' actions were unfair, unreasonable, arbitrary and oppressive or whether they were taken in good faith all raise genuine issues of material fact. See, e.g., Plaintiff's Response to Defendants' Statement of Undisputed Facts (Docket No. 70), ¶¶ 9, 10, 11, 12, 15. Whether TSSAA is a voluntary association is a disputed issue of fact. Id., ¶¶ 2, 4, 44. The parties clearly disagree as well about what actions were taken, what motivated those actions, and what resulted from those actions. Accordingly, Defendants' Motion for Summary Judgment with regard to Count VI is DENIED.

VIII. Conclusion

For the reasons described above, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is GRANTED in part and DENIED in part. Brentwood Academy's Motion is GRANTED as to its claim that TSSAA's Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy. Accordingly, Defendants are hereby enjoined from any use of the Recruiting Rule. All sanctions imposed by the TSSAA on Brentwood Academy pursuant to the August 27, 1997 letter from the TSSAA to Brentwood Academy (Docket No. 1, Ex. G) are void and unenforceable.

Defendants' Motion for Summary Judgment (Docket No. 47) is GRANTED in part and DENIED in part. Defendants' Motion is GRANTED as to Plaintiff's equitable estoppel claim and that claim is DISMISSED.

It is so ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 1999 FED App. 0323P (6th Cir.)
File Name: 99a0323p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,
Plaintiff-Appellee,

No. 98-6113

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, Executive Director And Individually,
Defendants-Appellants.

Filed: August 30, 1999*

Before: GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

ORDER

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*This order was originally issued as an "unpublished order" filed on August 30, 1999.

This matter is before the Court upon Brentwood Academy's petition for rehearing *en banc*. Having failed to achieve the requisite number of votes to sustain the request for rehearing, the petition has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. However, the panel will briefly address Brentwood Academy's argument that our decision is in conflict with earlier Sixth Circuit cases.

Because we have already addressed the cases of *Burrows v. Ohio High School Athletic Association*, 891 F.2d 122 (6th Cir. 1989), *Yellow Springs v. Ohio High School Athletic Association*, 647 F.2d 651 (6th Cir. 1981), and *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315 (6th Cir. 1985), in our published opinion, we find no need to comment any further on those cases. As to *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1978), *Hamilton v. TSSAA*, 552 F.2d 681 (6th Cir. 1976), and *Morris v. Michigan State Board of Education*, 472 F.2d 1207 (6th Cir. 1973), they all pre-date the *Blum* trilogy. *See Blum v. Yaretsky*, 457 U.S. 991 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982). The *Blum* trilogy establishes the current standard for determining when a private party's conduct can be considered state action and supercedes the earlier decisions in *Cape*, *Hamilton*, and *Morris*. Because of this, those cases were not discussed in our opinion.

Accordingly, the petition is denied.

MERRITT, Circuit Judge, separate statement on denial of rehearing en banc, in which Clay, Circuit Judge, joined. Although a substantial minority of the active judges of our

court have voted for en banc review of this case, unfortunately, there was not a majority. This is an important case because all high school interscholastic athletic contests in the states of the Sixth Circuit and in almost all other states in the country are conducted in similar fashion by athletic associations like the TSSAA.

Our court should grant en banc review in this case on the issue of whether the TSSAA --- the agency delegated the authority to control all high school athletic contests in Tennessee --- is engaged in "state action" under the Fourteenth Amendment. It should do so because our panel's holding that TSSAA is not a "state actor" contradicts the uniform case law in the field from other circuits and is inconsistent with the clearly established constitutional theory of state action. Under the panel's theory that such statewide athletic associations are not state actors, and hence not subject to fourteenth amendment restraints, the TSSAA could maintain a racially segregated system of interscholastic high school athletics like the one declared invalid in *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224, 227 (5th Cir. 1968) (*private* black high school sued LHSAA and the court held "there can be no substantial doubt that conduct of the affairs of LHSAA is state action in the constitutional sense"), or refuse to allow girls to participate in interscholastic high school athletics, *see Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (suit by a student to test gender regulations of AIA and the court held that "AIA regulations in question [respecting gender] meet the state action requirement of the fourteenth amendment"). The panel's decision that TSSAA is not a state actor is also inconsistent with at least four other circuit court decisions. The Third, Seventh, Eighth, and Tenth Circuits have also held that high school interscholastic athletic association are state actors. *See Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121,

125 (3d Cir. 1978); *Griffin High School v. Illinois High School Athletic Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987); *In Re: United States, ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982); *Oklahoma High School Athletic Ass'n v. Bray*, 321 F.2d 269, 273 (10th Cir. 1963). In addition, all of the several state supreme courts which have addressed the question have held that their high school interscholastic athletic associations are state actors. I find no circuit or state supreme court decision supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts.

In addition the panel's decision appears to be inconsistent with the Supreme Court's language in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 193 (1988), quoted below, citing with approval the Louisiana and Arizona cases mentioned above:

> Those institutions [of higher education], the vast majority of which were located in states other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular state. [13]
>
> > [13] The situation would, of course, be different if the membership consisted entirely of institutions located within the same state, many of them public institutions created by the same sovereign. *See Clark v. Arizona Interscholastic Ass'n*, . . . [and] *Louisiana High School Athletic Ass'n v. St. Augustine High School*. . . .

The panel's decision also appears to be inconsistent with our court's ruling in *Alerding v. Ohio High School Athletic Ass'n*,

779 F.2d 315, 316 n. 1 (6th Cir. 1985): "OHSAA is a state actor for purposes of § 1983 because Ohio has implicitly delegated to OHSAA its power to regulate and organize interscholastic athletic activities."

The panel's decision seems clearly inconsistent with the theory of state action set out in *West v. Adkins*, 487 U.S. 42, 55-56 (1988). There a unanimous Court said that state action analysis requires a "functional" analysis of the activity of the private individual or agency in question to determine the degree of "cooperation" between state and local officials and the actor and an analysis of the degree of "coercion" exercised by the actor over persons under the control of a state or local governmental institution. Our panel made no effort to analyze the cooperative relationship between TSSAA and the state's public high schools or the coercive power of TSSAA. The fact is that TSSAA establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee. Its board consists entirely of public school officials. Its funding comes from receipts from the athletic contests of public schools. The state delegates to TSSAA its authority to collect and retain gate receipts from public interscholastic contests. The state has chosen to allow its athletic fields and gyms to be used in this way. It has chosen to make TSSAA its agent for controlling an important, highly visible component of its statewide educational program --- inter-school athletics.

The Tennessee Department of Education delegates all of its plenary authority to control high school athletics to TSSAA. TSSAA has run high school interscholastic athletics with an iron hand for most of this century. For the most part, it has done a very good job; but under the panel's ruling that the fourteenth amendment does not apply to TSSAA because it is not a state actor, TSSAA could rule ineligible for competition

high school athletes on the basis of race, gender, national origin, or religion. It could disqualify, suspend or otherwise punish high schools and their students without notice and without a statement of reasons or a hearing or the other procedural protections provided by the due process clause.

Because our panel's decision is inconsistent with the basic authorities on state action, and with the well-established legal theory underlying their holdings, I dissent from our failure to grant en banc review of this case. We have created an unnecessary conflict in the circuits on an important question of constitutional law. The conflict will have to be remedied now by the Supreme Court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved in this case, are the First and Fourteenth Amendments, as enforced by the federal civil rights statute, 42 U.S.C. § 1983.

The relevant portion of the First Amendment provides:

> Congress shall make no law...abridging the freedom of speech.

The relevant portion of the Fourteenth Amendment provides:

> No state shall...deprive any person of life, liberty, or property without due process of law.

The relevant portion of the civil rights law, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

NO. 98-6113
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,

Plaintiff/Appellee,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION
and RONNIE CARTER, Executive Director and Individually,

Defendants/Appellants.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

BRIEF OF AMICI CURIAE CHESTER E. FINN, JR. AND DANIEL CASSE IN SUPPORT OF PLAINTIFF/APPELLEE BRENTWOOD ACADEMY'S PETITION FOR REHEARING *EN BANC* *

* This brief was filed in support of Brentwood Academy's Petition for Rehearing *En Banc* but was not accepted for filing pursuant to Rule 29(e), Federal Rules of Appellate Procedure.

We file this statement as individuals, on our own behalf. We are not lawyers but policy analysts long interested in education matters, and particularly in issues relating to accountability of public education systems and officials and to access to quality educational opportunity for all students. The panel decision in this case has been brought to our attention, and we want to share with the full Court our perceptions and concerns about what we regard as an important case and what seems to have been a most cursory treatment of serious matters by the panel opinion.

We should identify ourselves, although we reiterate that we speak on our own behalf and not as representatives of any organization or group (although we do think of ourselves as speaking, as we often have, on behalf of the cause of education accountability, access and quality).

Chester E. Finn, Jr. is the President of the Thomas B. Fordham Foundation, which is officed in Washington D.C. and does much of its work in Dayton, Ohio. The Foundation supports research on national education issues, including accountability and access. It widely disseminates the results of this research to policymakers, civic leaders and influential educators. In the Dayton area, where the Foundation has historical roots, it supports education activities designed to boost school quality, accountability, parent information and choice, particularly for disadvantaged youngsters heretofore trapped in unsatisfactory schools. Dr. Finn holds the bachelors, masters and doctorate degrees from Harvard University and has devoted his career to educational policy issues.

Dr. Finn has been involved in public service ranging from serving as an aide to Daniel Patrick Moynihan when Mr. Moynihan was Ambassador to India and U.S. Senator to

serving as Assistant Secretary of Education for Research and Improvement under Education Secretary William Bennett, with whom Dr. Finn is currently co-authoring a book on education (a parents' guide). For many years, Dr. Finn was affiliated with Vanderbilt University and the Hudson Institute and is now affiliated with the Manhattan Institute. Dr. Finn was also a founding member of the Edison Project, headed by former Yale University President Benno Schmidt, which designed alternative models for schools. Dr. Finn has done research on and is an expert on charter schools. He is also in the final stages of a book on that topic.

Daniel Casse is a senior director of the White House Writers Group, a public policy and strategic planning group. Mr. Casse received the bachelor's degree from the University of Toronto and his masters in public administration degree from the Kennedy School of Government Harvard University. He has served in the White House as special assistant to President Bush for Cabinet Affairs. Previously he had worked for William Bennett at both the U. S. Department of Education and National Office of Drug Control Policy. A former managing editor of The Public Interest, a public policy quarterly, his writing on politics and public policy has appeared in The Wall Street Journal, Commentary, and Policy Review. During the 1996 presidential campaign, Mr. Casse was a senior policy advisor to candidates Lamar Alexander and, later, Bob Dole.

I. The Reason for Concern: What This Case Is Really About

While we are not constitutional scholars, we are scholars and policy analysts with strong interests in the area of public school officials' accountability for, and young people's access

to quality educational opportunity. We are concerned that the panel opinion in this case misperceived the importance of the issues raised and tended to view the case -- somewhat dismissively -- as merely a high school sports case. As non-lawyers, we have great reverence for our judicial system, and indeed the sister of one of us is a judge herself. So we are quite sympathetic to what seems to be the panel's concern about the potential for heavy-handed judicial intervention in seemingly private matters of scant public consequence. In particular, we applaud the panel's general instinct that courts should not reach out to constitutionalize everyday behavior in the private realm. We concur that preserving a private realm beyond the scope of constitutional intrusion is an important value. Our concern is not with that principle underlying the panel's decision but with its application in the context of this case.

To state the point boldly, we think that the panel judged this book by its cover without peering very far inside to see what was written there. The symptoms are clear.

The very first paragraph of the panel's background discussion of the case is all about Brentwood Academy's athletic prowess. The panel self-evidently saw the case as one involving a "high school football powerhouse." The panel noted that the school's football team had been nationally ranked by USA Today, stated what the school's football record had been over the past 28 years, and noted that the school had won many statewide championships. The panel further noted that the school's "basketball team is also well known in athletic circles." (Slip Op. at 3). Near the end of the opinion, the panel noted the problems associated with the enforcement of the rule in question but placed emphasis on resolution of the dispute within the TSSAA rather than in federal court, indicating that

the court should not play the role of "super referee[] over high school athletic programs." (Slip Op. at 14).

This emphasis on considerations of "arbitrary enforcement" of "vague" rules led the panel to view this as a case about "eligibility for competition" in sports and that, so viewed, the issues were "not of constitutional magnitude." Id. The panel treated this entirely as a dispute about the arbitrary application of some rules and refused to intervene in what it regarded an internecine dispute about a matter of little constitutional or policy import. But our understanding is that the case far transcends the particulars of the dispute at issue. The District Judge held the rule in question unconstitutional not only as it applied in this particular case but on its face as it would apply in any case. That is the aspect of the dispute that has gotten our attention, since we have no interest ourselves in entering into a dispute about allegedly arbitrary enforcement of a sports-eligibility rule.

But to view this case in that way is fundamentally to misperceive what is at stake. This is not just a case about arbitrariness in formulating or applying a rule regarding the eligibility of athletes. That would be like saying that *Marbury v. Madison* was just a case involving the question of whether a particular judge should get his commission. It is true as far as it goes, but it does not go very far in fact and does not get to the true significance of the case. Just as the bus desegregation cases did not just involve the question whether the seats in the front of the bus were superior in some way (more convenient?, more comfortable?) to the seats in the rear, this case does not only deal with athletic eligibility.

Rather, this is a case involving fundamental First Amendment freedoms, which in this case arise in an athletic

context but which go to the heart of issues relating to access to quality education and school choice. Also, it is a case involving accountability of public school officials who seek to avoid this accountability by coming together in a nominally private association that they run and whose very purpose is to exercise explicit or implicit authority delegated to it by the state (which in Tennessee as in every other state is obliged under state constitutions not only to pay for but actually to provide educational services to its citizens).

II. The Accountability Concern

As we understand the constitutional doctrine, a finding of "state action" is an analytical prerequisite to subjecting conduct to constitutional scrutiny. As non-lawyers, we generally support the preservation of a private sphere beyond the scope of constitutionalization. But it strikes us as naive and simplistic to view these high school athletic associations as private, like a coaches' association, teachers' union or book club. From Brentwood Academy's Petition for Rehearing *En Banc*, we understand that every other jurisdiction that has decided the issue has concluded that these statewide high school athletic associations operate under the "color of" state law. The Petition makes quite a strong claim, and on general grounds it seems prudent for the entire Court to review a panel decision that seems out of sync with so much (and one-sided) precedent. Moreover, it seems that the panel decision faced conflicting precedent within the Sixth Circuit itself and tried to steer a path around some precedential debris. But its efforts in that regard do not seem especially successful to us as policy analysts, with the result that more rather than less uncertainty exists. The panel, as we understand it, is institutionally constrained in ways that the *en banc* Court is not. Resolving these uncertainties and establishing uniformity within the

Court's area of jurisdiction would seem to be an important and worthwhile goal.

From a broader policy perspective, we view with some alarm the implications for educational accountability of what we understand to be the import of the panel's decision. This is how we understand the state of the law from the panel's opinion. Public school principals join together to form an association that they label private. The mission of the organization is to regulate interscholastic athletics for the entire state. The association invites private schools to become members, and they comprise about 15% of the organization. The principals sit in their capacity as public school principals; the public school members pay dues to support this organization and the public school members make and enforce the rules. The public schools in turn agree to abide by the rules promulgated by this association and in their official interscholastic athletic activities implement these rules. These rules involve all interscholastic athletic activities in the state, which are an important extracurricular part of the educational mission of these public schools (and the state is obliged by its state's constitution to provide public education to its citizens). Moreover, for 24 years the State Board of Education explicitly delegated authority to this association to regulate interscholastic activities and, since 1996 when that explicit delegation was revoked, has continued to maintain the same relationship in fact with the association that it had for those 24 years. Under the panel opinion, the composition and control of the association apparently does not matter at all, since those issues are not discussed. And, at the state level, what seems like an empty formalism (the revocation of the explicit delegation) is given determinative effect since the panel opinion does not even purport to delve into the underlying functional realities.

In the education field, many of us have advocated the use of student testing to assure and measure quality. This is part of the educational accountability movement. Testing can be controversial because what is tested can influence what is taught. Control of testing is an essential component of accountability. Now imagine if the public school history teachers of Tennessee got together to form a private association to regulate the history curriculum of the state, inviting some private school history teachers into the association. The association establishes a history curriculum and develops a test that all students must pass if they are to be certified as high school graduates. All secondary schools in the state pay dues to this association and all of them, public and private alike, agree-with the blessing of state officials-to implement the curriculum and the testing regime adopted by this "private" history teachers association. Would the conduct of that association be beyond the scope of accountability because of its nominal status as a "private" organization? If so, this is a recipe for placing core issues of public education policy and quality beyond the sphere of public accountability.

Our sense is that the better approach, which apparently is the approach of every other jurisdiction that has dealt with this matter, is to hold these associations to constitutional accountability but, where the issues do not relate to such core values as those protected by the first amendment, to defer as a matter of substantive law to the decisions reasonably taken by these associations -- but not to eliminate accountability entirely. In any event, this matter is of sufficient general importance to warrant review by the Court *en banc*.

III. The Concern About Access to Quality Education

A particularly troubling aspect of the TSSAA regulation subject to challenge in this litigation is the attitude it expresses about the availability of educational opportunity for youngsters who might be attracted to a school such as Brentwood Academy. The District Court well captured the appropriate role of government in situations such as this. It is not in preventing the flow of information to potential students or their families, even if, when informed, those students choose to leave public schools and opt for private. It is an abuse of the first amendment for TSSAA, governed exclusively by a group of public school principals, to restrict communication -- the speaker's right to communicate information and the student's right to receive information -- on the educational opportunities available. This is particularly true when, as here, what motivates the restriction on speech is the fear that the listener will indeed act on the basis of that information.

The District Court properly understood the state's interest as prohibiting coercion or fraud, not eliminating any information that could inform school choice. How are students and their families to learn about private school opportunities -- and yes, financial aid opportunities as well - unless such information is broadly and freely available? How can government or TSSAA, which operates under color of law, justify a freeze on targeted school-initiated communication with prospective students? As the District Court found, it cannot. We would welcome a targeted set of restrictions that would enhance choice and opportunity by eliminating pressure tactics and other encumbrances to choice. But a flat-out ban on targeted school-initiated communication is entirely inappropriate.

Further, the concern about students and their families learning about private school options is thoroughly at odds with the first amendment's guarantee that communication and information inform choice, but that choice regarding speaker and subject matter remains with the speaker and listener. And, consistent with the first amendment, government has no legitimate interest in stifling school choice by restricting the flow of helpful and truthful information. Government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships, even at the expense of the child's overall welfare. Maintaining a competitive balance in athletics just cannot be an appropriate or legitimate basis for suppressing speech and thereby restricting educational opportunity for students. The District Court saw this point, but it seems not to have reached through to the deliberations of the panel that decided the appeal in this case.

Extracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds. The opportunity to attend a private school such as Brentwood Academy, with its emphasis on college preparation and admission (one of its swimmers was admitted to Yale this year), cannot be realized unless potential students and their families have access to information about curricular and financial-aid activities. If schools are interested in a youngster's talents -- whether curricular or extracurricular -- it is not the business of government to suppress speech so that a youngster is kept in the dark about educational choices that may be available to him or her. Surely, keeping a prospective varsity athlete in the dark to assure his or her playing for a public school athletic program is an insufficient basis for imposing a blackout on school-initiated targeted

communications. The first amendment guards against that type of censorship (while allowing for regulation of coercive conduct).

In addition, extracurricular activities constitute an integral component of an overall education for most youngsters. The panel decision seemed to regard interscholastic athletics as entirely distinct from education. This is incorrect. Students learn in different ways, but one essential ingredient is motivation. While valuable in themselves for such lessons as leadership skills and physical well-being, extracurricular activities such as athletics are important as a way of motivating young people. Many athletes who stay in school or progress into a university setting may have been encouraged to study because of their interest in sports, but learning and the pursuit of knowledge can be infectious. Athletics can provide the exposure to ideas and the motivation to learn. They, like art, drama, and journalism, can serve as the hook to get the attention of students and rivet it on the core curricular mission of the schools.

The hostility to students' access to choices in selecting their secondary school is palpable in the regulation under challenge. And the particular method of resisting access to educational quality through choice -- the suppression of speech -- is peculiarly odious in a democratic society because it suggests that government somehow has a right to expect students to attend (and play sports for) public schools. But children are not the property of the state, and government cannot stifle access to educational opportunity through censorship.

These are important national issues in education, and they far transcend the characterization of the issues as described in the panel opinion. As we understand it, these free speech

claims could have been brought even in the absence of a specific episode, so the concern about judicial micromanagement of sports eligibility questions is not really the core question here. Accountability of public education officials, and access to information that allows informed educational choice and access to quality education are the critical issues in this litigation. We worry that the panel never got beyond the fact that Brentwood Academy is a football "powerhouse" to a consideration of just how significant the issues in this matter are to core educational values now being debated nationally. For these reasons, review of this matter by the Court *en banc* is highly desirable.

Respectfully submitted,

/s/_____
Chester E. Finn, Jr.

/s/_____
Daniel Casse

No 99-901

Supreme Court, U.S.
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DEC 30 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT OF THE CASE

Although the Statement of the Case by the Petitioner Brentwood Academy ["Brentwood Academy"] bears some resemblance to the truth, Brentwood Academy has in many instances substituted hyperbole for fact, creating a distorted picture of the history and organization of the Tennessee Secondary School Athletic Association ["TSSAA"], the role of interscholastic athletics as a part of the public education process in Tennessee, and the effect of the TSSAA recruiting rule. When these distortions are corrected, Brentwood Academy's arguments for granting the petition lose whatever persuasive force they might otherwise have.

TSSAA is a private, not-for-profit, incorporated association. TSSAA is a voluntary association of public and private schools that have chosen to join together in order to self-regulate their interscholastic athletic competition. While the majority of the TSSAA member schools are in fact public schools, membership is open to secondary schools throughout the State of Tennessee, both public and private. However, no school, public or private, is compelled to maintain membership in TSSAA or to field teams for interscholastic athletic competition in any particular sport — or in any sport whatsoever.

TSSAA has been organized and in existence since 1925. The Tennessee State Board of Education *has not* recognized the functions of TSSAA in providing rules and regulations for interscholastic athletic competition among public schools in Tennessee since 1925. On the contrary, from 1925 until 1972, TSSAA operated without designation or recognition by the State Board of Education or any other governmental agency. It was not until 1972 that the State Board of Education first spoke to the issue of interscholastic athletic competition.

In 1972 the State Board of Education nominally approved the TSSAA rules and reserved a non-existent "right" to review and

approve changes to those rules. The promulgation of a rule by the State Board of Education recognizing the function of TSSAA had no effect on the manner in which TSSAA operated.

Just as it did before 1972 and as it has since, TSSAA operates in a representative fashion. The member schools elect a nine-member Legislative Council that serves a rule making function, and the member schools elect a nine-member Board of Control that has final authority to interpret and enforce the TSSAA rules. A principal, assistant principal or headmaster of a member school is eligible for election to either the Legislative Council or the Board of Control. Contrary to Brentwood Academy's assertion, there have been private school officials who have served on the Legislative Council and the Board of Control, and each representative body currently has at least one private school principal or headmaster.

The Board of Control elects an Executive Director who serves as a full-time administrative employee of TSSAA for a three year term. The Executive Director maintains the records and property of TSSAA, initiates investigations, conducts hearings, collects information, renders decisions, and fixes penalties based on the evidence, all in accordance with the rules and regulations of TSSAA. Ronnie Carter, the TSSAA Executive Director, renders decisions that are subject to review by the Board of Control if appealed by a voluntary member school. Carter and his staff are not government employees.

TSSAA's purpose is to stimulate and regulate the interscholastic athletic relations between its voluntary member schools. In order to accomplish its functions, TSSAA operates on a budget that includes approximately 1.6 million dollars in annual gross receipts. None of TSSAA's funds are derived from taxes imposed by state or local government authorities. Instead, TSSAA's funds are derived primarily from gate receipts of tournaments and playoffs which TSSAA sponsors for its mem-

ber schools. Only 4% of TSSAA's annual budget comes from the membership dues paid by member schools.

Despite the 1972 unilateral action of the State Board of Education, TSSAA has never sought State Board of Education approval of its rules or by-laws, and the State Board of Education has never attempted to control the operation of TSSAA. While the State Board of Education did on a few occasions take action to approve the TSSAA rules, the minutes of the State Board of Education reflect no consideration of the recruiting rule in particular or of any of the TSSAA rules in any detail. As former State Board of Education Chairman Brent Poulton described it, the Board's "approval" of TSSAA's rules on a few isolated occasions was simply "ceremonial," since the Board possessed no authority to control the operations of TSSAA and could not acquire that authority through the unilateral adoption of its 1972 resolution.

Consistent with Poulton's acknowledgment, the State Board of Education on February 28, 1996, amended its rule. As a result of this amendment, adopted more than a year before the operative events in this case, the State Board of Education no longer designates TSSAA for any purpose nor approves TSSAA's rules. Instead, the State Board of Education simply authorizes the public schools in Tennessee "to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." Administrative Rule 0520-1-2-.08 of the State Board of Education of Tennessee.

There are no state laws requiring the public schools in Tennessee to join TSSAA or to engage in interscholastic athletic competition at all. The Tennessee statutes pertaining to public education, contained in Title 49 of the Tennessee Code, are silent with regard to interscholastic athletic competition. For both public and private schools, membership in TSSAA is optional, not compulsory. Brentwood Academy, a private school, volun-

tarily chooses to join TSSAA on an annual basis. In doing so, Brentwood Academy agrees each year that in exchange for the opportunity to compete for TSSAA championships, it will comply with the Constitution and By-Laws of TSSAA and with the decisions of the TSSAA Executive Director and Board of Control.

Among the TSSAA By-Laws is a rule that prohibits TSSAA member schools from recruiting student athletes "for athletic purposes." Article II, Section 21 of the TSSAA By-Laws provides:

> "The use of undue influence on a student (with or without an athletic record) the parents or guardians of a student by any person connected or not connected with the school to secure or retain a student ***for athletic purposes*** shall be a violation of the recruiting rule." [Emphasis supplied].

Contrary to the unfounded assertion Brentwood Academy has made at every step of this litigation, the recruiting rule does not impose a ban or absolute bar on contact between a school and a prospective student athlete.[1] The recruiting rule addresses communications directed at prospective athletes based on their status as prospective athletes. A form letter to all prospective students (not just eighth-grade boys who are candidates for the football team), which gives general school information, is a form of school-initiated communication that can be used to provide information about athletics without violating the recruiting rule. Information about athletics can be provided in response to inquiries from prospective students. Brentwood Academy can provide all the information it wishes about athletics, as well as any other aspect of its program, during visits to the school by prospective students. Brentwood Academy can place advertise-

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[1] See, e.g., Petition pp. 2, 5, 11, 13.

ments in visual, audio, and print media to convey information about its athletic program. All of these types of communications can be initiated by Brentwood Academy without running afoul of the recruiting rule. As the "Guidelines for Understanding the Recruiting Rule and Understanding What Is 'Undue Influence'" in the TSSAA Handbook explain, the key to understanding the recruiting rule is the underlying purpose that athletes or prospective athletes be treated no differently than students who are not athletes, so that students are not singled out based on their potential athletic ability.

The recruiting rule violations that gave rise to this action were three-fold. First, the athletic director[2] at Brentwood Academy provided free passes to a middle school football coach, who in turn used the passes to gain free admission for two of his star middle school football players at a Brentwood Academy football game. Second, the Brentwood Academy athletic director sent a letter in the spring of 1997 to a dozen male students at various middle schools whose applications had been approved for enrollment the following year, inviting those students to attend spring football practice at Brentwood Academy. Third, the Brentwood Academy athletic director and football coach then contacted each of these male students by telephone to reiterate the invitation he had made by letter. None of the recruiting rule violations involved efforts by Brentwood Academy to communicate with students and their parents about "opportunities for educational enrichment." Each of the violations involved interaction, purely for athletic reasons, between the athletic director at Brentwood Academy and prospective student athletes enrolled at other schools.

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[2] Carlton Flatt served as athletic director and head football coach at Brentwood Academy at all relevant times. Despite its relatively small enrollment, Brentwood Academy's football teams won a number of TSSAA state championships and received national publicity under Flatt's guidance.

ARGUMENT

I. THERE IS NO REAL SPLIT AMONG THE CIRCUITS.

Contrary to Brentwood Academy's insistence, there is no real conflict between this case and decisions of other federal appellate courts. In 1982, this Court issued three decisions which redefined the "state action" analysis in cases involving private party defendants. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). These three cases, which explained how the state action analysis was to be conducted in cases involving private entities, came to be known as the *Blum* trilogy.[3]

At least three of the appellate decisions upon which Brentwood Academy relies, representing the Third, Fifth, and Eighth Circuits, were decided prior to the *Blum* trilogy.[4] Moreover, the post-*Blum* decisions upon which Brentwood Academy relies are inadequate to establish any division among the circuits.

In *Griffin High School v. Illinois High School Association*, 822 F.2d 671, 674 (7th Cir. 1987), state action was not in dispute, and the Court therefore undertook no analysis of the facts. In *In re: United States ex rel. Missouri State High School Activities*

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[3] Although Brentwood Academy refers to TSSAA as a "nominally private" association, noticeably absent from Brentwood Academy's petition is any discussion of the *Blum* trilogy. Aside from a single citation to *Blum v. Yaretsky* in a footnote, there is no mention in the petition of these three seminal decisions which established the contours of the state action analysis required in this case.

[4] *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121 (3d Cir. 1978); *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1973); *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968).

Association, 682 F.2d 147, 151 (8th Cir. 1982), the Court similarly omitted any analysis of the state action issue. The entire discussion of state action was contained in one sentence, where the only fact noted was that the MSHSAA was comprised primarily of public schools. In *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126, 1128 (9th Cir. 1982), the state action issue was not raised by the parties. Although *Clark* was a post-*Blum* decision, the Ninth Circuit relied on *Yellow Springs Exempted Village School District Board of Education v. OHSAA*, 647 F.2d 651 (6th Cir. 1981), and other pre-*Blum* decisions, to support its finding of state action. *Clark* included no mention of the *Blum* trilogy.

Brentwood Academy also points to "controlling doctrine" in the Eleventh and Fourth Circuits to support its alleged inconsistency. The Eleventh Circuit "controlling doctrine" is not a case where the state action issue was considered, but is simply a case where the Eleventh Circuit adopted Fifth Circuit precedent when it split from the Fifth Circuit in October 1981.[5] The Fourth Circuit decision, a pre-*Blum* decision, included no substantive analysis of the state action issue since the parties stipulated the existence of state action.[6] Even the District Court cases relied upon by Brentwood Academy for having treated the state action

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[5] *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

[6] *O'Connell High School v. Virginia High School League*, 581 F.2d 81 (4th Cir. 1978).

issue as "clearly established, settled law" are of no value in the state action analysis.[7]

Relying on the *Blum* trilogy, this Court recently reiterated that a finding of state action on the part of a private entity requires both an alleged constitutional deprivation caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state *and* that a party charged with the deprivation is a person who may fairly be said to be a state actor. *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40, 119 S.Ct.977, 143 L.Ed.2d 130, 143-44 (1999). The only post-*Blum* decisions in which a high school athletic association's state actor status has been analyzed, rather than

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[7] *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F.Supp. 663 (D.Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) (a single sentence, with no analysis, encompasses the entire state action discussion); *Robbins v. Indiana High School Athletic Association*, 941 F.Supp. 786 (S.D.Ind. 1996)(state action found without any factual analysis); *Brewer v. Purvis*, 816 F.Supp. 1560 (M.D.Ga. 1993)(state action found without any substantial factual inquiry and without reference to *Blum* trilogy tests for state action); *Libby v. South Inter-Conference Association*, 728 F.Supp. 504 (N.D.Ill.), *affirmed*, 921 F.2d 96 (7th Cir. 1990)(District Court found association to be a state actor without any analysis of the facts, and the Seventh Circuit decision was unrelated to the state action issue); *Crane v. Indiana High School Athletic Association*, 975 F.2d 1315 (7th Cir. 1992)(majority decision based solely on state law grounds, constitutional issues addressed only in dissent, with state action discussed in a parenthetical portion of one sentence in the dissent); *Bingham v. Oregon School Activities Association*, 37 F.Supp. 2d 1189 (D.Ore. 1999) (state action mentioned in a footnote that was dicta in this case under Title II of the Americans with Disabilities Act of 1990); *Barnett v. Texas Wrestling Association*, 16 F.Supp. 2d 690 (N.D.Tx. 1998) (on summary judgment, District Court simply concluded that there was an issue of material fact on the association's state actor status); *Jordan v. Indiana High School Athletic Association*, 813 F.Supp. 1372 (N.D.Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994) (recognizing that Judge Posner's dissent in Krane did not arise to a conclusive command by the Seventh Circuit on the state action issue).

simply accepted or assumed, both arise out of the Sixth Circuit. They include this case and *Burrows v. Ohio High School Athletic Association*, 891 F.2d 122 (6th Cir. 1989). There is no split among the circuits in cases where an athletic association's state actor status is analyzed under modern state action principles. The Sixth Circuit is the only circuit where such an analysis has occurred, and the Sixth Circuit has concluded that neither the OHSAA nor the TSSAA is a state actor.

II. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT.

Although a number of lower courts have assumed, without analysis, that high school athletic associations are state actors for purposes of the Fourteenth Amendment and 42 U.S.C. §1983, the Sixth Circuit's analysis of the state action issue and the result of that analysis are consistent with the decisions of this Court.

A person acts under color of state law for purposes of 42 U.S.C. §1983 only when exercising power that he possesses by virtue of state law and that is made possible only because he is clothed with the authority of state law. *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981); *Monroe v. Pape*, 365 U.S. 167 (1961); *United States v. Classic*, 313 U.S. 299, 326 (1941). TSSAA's power to regulate the interscholastic athletic competition engaged in by Brentwood Academy is power possessed solely because Brentwood Academy voluntarily chose to join TSSAA and is made possible only because Brentwood Academy made that choice. State law has nothing to do with TSSAA's power to regulate Brentwood Academy's interscholastic athletic competition.

In 1982, this Court issued the three decisions which comprise the *Blum* trilogy. The state actor status of a private individual or entity like TSSAA is to be determined in accordance with the principles announced in the *Blum* trilogy.

The requirement that a person act under color of state law for purposes of 42 U.S.C. §1983, like the requirement of "state action" under the Fourteenth Amendment, represents recognition that most rights secured by the Constitution are protected only against government infringement and not against private conduct. *Lugar v. Edmondson Oil Company*, *supra*, 457 U.S. at 936 (1982). The courts must carefully adhere to the state action requirement in order to avoid imposing the Constitution, federal law, and federal judicial power in areas where the framers of the Constitution intended to preserve individual freedom without government coercion. *Id.* The courts should be careful not to extend the Constitution beyond its intended reach by imposing their authority under 42 U.S.C. §1983 upon persons who are not truly acting under color of state law.

In *Blum v. Yaretsky*, *supra*, this Court considered a challenge to a private nursing home's discharge or transfer of Medicaid patients. The nursing home was extensively regulated by the State of New York. These regulations allegedly commanded the summary discharge or transfer of Medicaid patients under various circumstances. This Court held that the private nursing home was not a state actor and that the mere fact that the nursing home was subject to state regulation did not convert the nursing home's action into that of the state for purposes of the Fourteenth Amendment. *Id.* at 1004.

In *Blum* this Court explained that a private enterprise may be engaged in state action when the state exercises coercive power or provides such significant encouragement that the choice must in law be deemed to be that of the state or where the private entity exercises powers that are traditionally and exclusively reserved to the state. *Id.* at 1004-1005. Rejecting the "symbiotic relationship" argument from *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court in *Blum* stated:

> "As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Blum*, 457 U.S. at 1011, (citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 357-58 (1974).

In *Jackson v. Metropolitan Edison Company*, relied on in *Blum*, this Court held that the *Burton* "symbiotic relationship" test was limited to circumstances where the private entity was a lessee of public property. *Jackson*, 419 U.S. at 357-58.

In *Rendell-Baker v. Kohn*, *supra*, another of the *Blum* trilogy cases, this Court again concluded that state regulation, even if "extensive and detailed," cannot convert private action into that of the state. *Id.* at 841. This Court rejected the argument that the private entity, a school, was serving a "public function," and instead focused its inquiry upon whether the function performed had been "traditionally the *exclusive* prerogative of the State." *Id.* at 842 (emphasis in original).

Under any analysis, for a defendant to be subject to suit under 42 U.S.C. §1983, that defendant's actions must be fairly attributable to the state. *Lugar*, 457 U.S. at 936. In view of this basic principle of state action analysis, this Court in 1987 decided *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), holding that the U.S. Olympic Committee was not a governmental actor bound by the constraints of the Constitution. This Court recognized that the USOC was a corporation established by federal law, that the law imposed certain requirements upon the USOC, that the USOC was granted exclusive use of the Olympic words and symbols by federal law, and that the USOC received direct federal funding grants. *Id.* at 542-43. Still, this Court held:

> "Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government . . . . Moreover, the intent on the part of Congress to help the USOC obtain funding does not change the analysis. The Government may subsidize private entities without assuming constitutional responsibility for their actions.
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>
> Certainly the activities performed by the USOC serve a national interest, as its objects and purposes of incorporation indicate. . . . The fact '[t]hat a private entity performs a function which serves the public does not make its acts a [governmental] action.'
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> * * *
>
> ***Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.***" *Id.* at 544-45 (emphasis supplied) (citations omitted).

Following the *United States Olympic Committee* decision, this Court decided *NCAA v. Tarkanian*, 488 U.S. 179 (1988), once again recognizing that the function of fostering amateur athletics was not a traditional, let alone an exclusive, state function. *Id.* at 197 n. 18. Of course, Brentwood Academy points to a single sentence of dicta in footnote 13 of the *Tarkanian* opinion as the end-all answer to the question of whether TSSAA is a state actor.

In the same footnote, the other sentence of dicta declares that even if the NCAA were a state actor, it would not be acting under color of state law in its relationships with private universities. *Id.* at 193 n. 13. Under this dicta, TSSAA would not be a state actor in its relationship with Brentwood Academy. Brentwood

Academy's myopic assessment of the significance of *Tarkanian* ignores even another sentence of dicta in the same footnote it treats as dispositive.

Of course, dicta in a footnote does not satisfy the requirement that the circumstances be examined closely, consistent with careful adherence to the state action requirement, when determining whether TSSAA is a state actor. When the circumstances are examined closely, consistent with careful adherence to the state action requirement, a number of important aspects in this Court's *Tarkanian* decision suggests that TSSAA should not be viewed as acting under color of state law in its relationship with Brentwood Academy. Like NCAA member schools, TSSAA member schools agree when joining the association that they will abide by and enforce the TSSAA rules. *Id.* at 183. These rules govern the conduct of interscholastic athletic programs of TSSAA members and, like the NCAA legislation, include limitations on the recruiting of student athletes. *Id.* Like the NCAA, TSSAA has enforcement procedures that are an essential part of the interscholastic athletic programs of its member schools. *Id.* at 184. The source of the TSSAA rules, like the source of the NCAA legislation, is the collective membership of the organization. *Id.* at 193. And while it must be assumed that public school members of TSSAA have had an impact on TSSAA's promulgation of its rules, it must also be assumed that independent and parochial school members of TSSAA have also participated in the promulgation of those rules. *Id.*

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court noted that the ABA's formulation of disciplinary rules was not state action even though the State Supreme Court adopted those rules in *toto* and enforced them against its members since the State Supreme Court "retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Tarkanian*, 488 U.S. at 194 (discussing *Bates v. State*

Bar of Arizona, *supra*). Similarly, this Court in *Tarkanian* noted that the UNLV's adoption of the NCAA's rules to govern its own behavior did not transform the NCAA into a state actor. *Id.* Using the same analysis, the unilateral decision in 1972 by the State Board of Education to approve TSSAA's rules and to designate TSSAA as the entity to regulate the interscholastic athletic relations to public high schools in Tennessee did not convert TSSAA's formulation of its rules into state action any more than the Supreme Court's enforcement in *Bates* converted the ABA's formulation of disciplinary rules into state action.

In *Tarkanian*, this Court also noted:

> "So here, UNLV retained the authority to withdraw from the NCAA and establish its own standards. The University alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy." *Tarkanian*, 488 U.S. at 194-95.

This Court recognized that the NCAA, like the TSSAA in this case, enjoyed no governmental powers to facilitate its investigation, such as the power to subpoena witnesses, impose contempt sanctions, or assert sovereign authority over any individual. *Id.* at 197. And, although the plaintiff in *Tarkanian* argued that the power of the NCAA was so great that UNLV had no practical alternative to compliance, this Court stated:

> "[E]ven if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law." *Id.* at 198-99.

The fact that non-membership in the association and the resulting inability to compete for association-sponsored cham-

pionships might be unpalatable does not make that option non-existent. *Id.* at 198 n. 19.

Like the NCAA, the TSSAA has no official authority that has been conferred upon it by the government. *Id.* at 193-94 (citing *Allied Tube & Conduit Corporation v. Indianhead, Inc.* 486 U.S. 492, 501 (1988)). The regulation of interscholastic athletic competition in Tennessee is not an activity traditionally and exclusively reserved to the state. *Id.* at 197 n. 18. In fact, TSSAA regulated the interscholastic athletic competition of its members for 47 years prior to any supposed state involvement through the unilateral adoption of the State Board of Education regulation. Brentwood Academy is under no compulsion to join TSSAA. *Id.* at 193 n. 13. And, while it may be unpalatable to Brentwood Academy to withdraw from TSSAA and no longer be in a position to hold itself out as a TSSAA football champion, Brentwood Academy nonetheless retains the option of withdrawing from TSSAA if it does not wish to comply with the TSSAA rules. *Id.* at 198-99, 198 n. 19.

In March 1999, this Court issued its decision in *American Manufacturers Mutual Insurance Company v. Sullivan, supra.* In *Sullivan* this Court once again acknowledged that private conduct, no matter how discriminatory or wrongful, was beyond the reach of 42 U.S.C. §1983. *Sullivan*, 143 L.Ed.2d at 143. This Court emphasized that state action requires both an alleged deprivation caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible, and that the party charged with the deprivation be a person fairly said to be a state actor. *Id.* at 143-44. This Court noted that state regulation does not by itself convert a private entity's action into state action, and that action taken by private entities with the mere approval or acquiescence of the state also is not state action. *Id.* at 144-45.

This Court in *Sullivan* distinguished *West v. Atkins*, 487 U.S. 42 U.S (1988), a decision upon which Judge Merritt in dissent below and Brentwood Academy here rely heavily. The Court noted that in *West*, the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private person gave rise to a finding of state action. *Id.* at 147. However, in *Sullivan* there was no state constitutional or statutory requirement obligating the State to provide the benefits at issue.

The issue here involves an activity, interscholastic athletic competition, which the State is not required to provide either by Constitution or by statute. Contrary to Brentwood Academy's assertion, the public schools' educational programs are indeed separate from those schools' athletic programs. The state exercises regulatory authority over the educational programs in public schools. The state requires that certain course offerings be provided by the public schools and that certain credits be achieved in order to graduate from a public school. The state exercises no regulatory authority over interscholastic athletics in the public schools. Interscholastic athletic competition is simply sports competition between different schools. While it is an activity that may be enjoyable and sometimes valuable, it is *not* an integral part of the public education governed by the state. There is no state law requiring any public school to conduct an interscholastic athletic program of any type, nor is there any state law which regulates what competitive sports a school must offer or how it must conduct any interscholastic athletic program it chooses to implement. No school in Tennessee is required by Constitution or by statute to join TSSAA.[8] *West* is inapplicable here just as it was inapplicable in *Sullivan*.

[8] Contrary to Brentwood Academy's assertion, TSSAA does not control state interscholastic athletic championships. See Petition p. 14 n. 7. TSSAA controls TSSAA championships. There is no law prohibiting public or private schools from withdrawing from TSSAA and forming a separate organization with its own championships.

The decision about whether to engage in interscholastic athletic competition, for both public and private schools, is a decision over which the state exercises no compulsion. A determination of what sports to offer for interscholastic athletic competition, for both public and private schools, is a decision over which the state exercises no compulsion. The decision to join TSSAA, for both public and private schools, is a decision over which the state exercises no compulsion. There is no requirement under the Constitution of Tennessee or under state law that the state provide interscholastic athletics, in any particular sport or at all, in its public schools or that the state do so under the auspices of TSSAA.

The Sixth Circuit's determination that TSSAA is not a state actor is consistent with the principles announced by this Court in the *Blum* trilogy, consistent with this Court's decision in *United States Olympic Committee*, consistent with the Court's analysis in *Tarkanian*, and consistent with this Court's rationale in *Sullivan*.

III. SUPREME COURT REVIEW IS UNWARRANTED.

Brentwood Academy suggests in its petition that this case is of national importance because of its impact on school choice and because of issues of accountability. Brentwood Academy's school choice argument is pure fantasy with no basis in fact. Brentwood Academy's accountability argument misconstrues the role of government and of the courts under our Constitution.

Brentwood Academy suggests that the TSSAA recruiting rule restricts the ability of independent schools to seek out students by informing them of educational opportunities, and that the rule also makes it more difficult for students and parents to learn about alternative educational options, including financial aid. There is no evidence whatsoever to support this assertion. The TSSAA recruiting rule simply does not "flatly bar" any private

school from contacting a student enrolled at a public school. The lynch pin of the recruiting rule is that it addresses efforts to secure a student "for athletic purposes." The rule does not address "educational opportunities." Nothing in the rule prohibits a private school from informing prospective students about educational opportunities at the school. Indeed, private schools in general, and Brentwood Academy in particular, have flourished while also complying with the TSSAA recruiting rule. Compliance with the rule has not prevented private schools like Brentwood Academy from filling their available enrollment and from having waiting lists of prospective students hoping for vacant seats. There are numerous ways for Brentwood Academy to inform prospective students of the educational opportunities offered by a private school without running afoul of the recruiting rule's prohibition against attempting to secure the attendance of a student for athletic reasons. The recruiting rule does not prevent Brentwood Academy from supplying general information, including information about the school calendar, the academic offerings, the availability of financial aid, and even athletics, to prospective students. It is the singling out of students for athletic reasons, e.g. the athletic director and football coach contacting twelve particular male prospective students to invite them to attend spring football practice prior to their enrollment at the school, against which the recruiting rule guards.

In addition, Brentwood Academy tries to paint a view of TSSAA as an organization that fosters a purported proprietary interest in students by the public schools, and an organization that views students as a means to an end, a sports championship for a public school team. Brentwood Academy's argument in this regard is an effort to turn the tables, painting itself as the occupant of a higher moral ground where the only interest is in fostering educational opportunities for children. There is no evidence to support any of these arguments or assertions by Brentwood Academy. Indeed, the evidence is to the contrary.

The express purpose of the TSSAA recruiting rule is to treat athletes and prospective athletes no differently than students who are not athletes, so that education remains the foremost concern and so that eighth graders are not recruited for athletics by high schools in the same fashion that seniors are recruited for athletics by colleges. On the other hand, there cannot be found, among the recruiting rule violations by Brentwood Academy, an effort to inform a student or his family about educational alternatives. The recruiting rule violations here all pertained to the Brentwood Academy football program. No officials of Brentwood Academy associated with academic areas of study were involved in the recruiting rule violations. All of the acts found to be in violation of the recruiting rule were the acts of Carlton Flatt, the athletic director and head football coach at the school.

In *Crocker v. Tennessee Secondary School Athletic Association*, 980 F.2d 382 (6th Cir. 1992), the Sixth Circuit noted:

> "[TSSAA] is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life. The main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Id.* at 386-87.

While Brentwood Academy waxes eloquent about alternative educational opportunities, this case is little more than *Crocker* pursued by an institution rather than an individual. Brentwood Academy's claims are not about academic opportunities for prospective students, nor are they about true First Amendment concerns. This case is about high school sports, an activity that is purely optional for students and, indeed, for the schools themselves.

Brentwood Academy's argument about "accountability" should be rejected out of hand. Brentwood Academy suggests, apparently as a matter of general policy, that TSSAA should be subject to suit under federal statutory or constitutional law. Neither the Constitution nor the federal statutes which implement constitutional protections are intended to apply to every person or entity. Indeed, the limited application of the Constitution is precisely why the state action requirement is a part of 42 U.S.C. §1983. As this Court recently noted in *Sullivan*, *supra*, private conduct, no matter how discriminatory or wrongful, is beyond the reach of 42 U.S.C. §1983 and the Fourteenth Amendment. *Sullivan*, 143 L.Ed.2d at 143 (quoting *Blum*, *supra*, 457 U.S. at 1002).

The framers never intended that the constitutional requirement of equal protection be imposed upon every person or entity, and Congress never intended that 42 U.S.C. §1983 be used as a vehicle to impose constitutional requirements on private actors. The state action requirement exists to protect against overexpansive government which might otherwise intrude unnecessarily into the private realm. *Lugar*, 457 U.S. at 936.

This Court's decisions regarding the NCAA show the folly of Brentwood Academy's assertion. In *NCAA v. Smith*, 119 S.Ct. 924 (1999), this Court held that the NCAA was not subject to suit under Title IX. As Brentwood Academy asserts, the same analysis would apply to a Title VI claim, leaving the NCAA free of scrutiny under either provision. Because *Smith* would seemingly apply to state associations like TSSAA, Brentwood Academy suggests that this Court should not affirm a decision from the Sixth Circuit that would also immunize TSSAA from scrutiny under constitutional law. However, this Court's *Tarkanian* decision, when combined with *Smith*, leaves the NCAA in precisely the position that Brentwood Academy insists TSSAA should not occupy. Under *Tarkanian* the NCAA is not a state

actor under 42 U.S.C. §1983, and under *Smith* the NCAA is not subject to suit under Title IX or Title VI. Certainly the sphere of influence of the NCAA is much broader than the sphere of influence of TSSAA, whose activities are confined to a single state. There is no greater reason to impose accountability under federal law or constitutional law upon TSSAA than there was upon the NCAA when this Court decided *Tarkanian* and *Smith*.

Simply put, the question is not whether it is a good idea to hold TSSAA accountable. The question is whether TSSAA is a state actor under §1983.[9] There is no general principle of constitutional or statutory "accountability" upon which the courts may or should rely to assert federal jurisdiction over the acts of private citizens or entities.

CONCLUSION

There are no compelling reasons for this Court to review the decision of the Sixth Circuit in this case. The Sixth Circuit's decision is consistent with this Court's instruction, since the *Blum* trilogy, on resolving the state actor question. When limited to cases where the status of a state athletic association as a state actor has been analyzed, rather than simply assumed, there is no inconsistency among the circuits. Finally, there are no compelling policy reasons why this Court should review the Sixth Circuit's decision.

Instead, as a matter of policy the Court should decline to review this case further. In *OHSAA v. Bray*, 321 F.2d 269, 273 (10th Cir. 1963), the Tenth Circuit stated:

> "The potential jurisdiction of the Civil Rights Act cannot be used as a sham for a review of the acts of the Board of Control which do not involve a civil right."

[9] Like UNLV in *Tarkanian*, any public school member of TSSAA remains subject to the requirements of the civil rights laws, even if it means the school must withdraw from TSSAA to comply with those laws.

Brentwood Academy is using 42 U.S.C. §1983 as a sham. This case is not about free speech. It is not about Brentwood Academy's desire to inform students of educational opportunities. This case is about Brentwood Academy's desire to claim TSSAA athletic championships without having to follow the TSSAA rules, rules it agreed to follow when it voluntarily joined TSSAA. This is a case about high school sports. As Judge Posner noted in his dissent in *Crane v. Indiana High School Athletic Association*, 975 F.2d 1315, 1328 (7th Cir. 1992) (J. Posner, dissenting), constitutional issues raised by this challenge to the TSSAA recruiting rule are *insubstantial* in "our sports obsessed society."

Brentwood Academy, a small, private, college preparatory school, has an enduring record of football success. The goal of the TSSAA recruiting rule is to prevent a sports-obsessed school from treating school-aged children as athletes first and students second. Brentwood Academy ran afoul of that rule, a rule it expressly agreed to follow. Brentwood Academy then devised a constitutional vehicle to use in an effort to dictate which rules it would choose to follow as a member of TSSAA. The fact that this case has reached this level is a sign of just how "sports-obsessed" our society has become. The Sixth Circuit's decision was correct, and this Court should deny Brentwood Academy's petition.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Reply to Respondents' Brief In Opposition

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Petitioner's Reply To Respondents' Brief In Opposition

INTRODUCTION

Brentwood Academy files this Reply to Respondents' Brief in Opposition to Brentwood Academy's Petition for Writ of Certiorari. This filing is triggered in substantial part by a remarkable and very recent decision of the United States District Court for the Western District of Michigan, which is part of the Sixth Circuit: *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, [MHSAA] 2000 U.S. Dist. LEXIS 574 (W.D. Mich. January 21, 2000).[1] Although bound by the decision of the United States Court of Appeals for the Sixth Circuit in the instant case, the district court in *Communities for Equity* refused to follow the *Brentwood Academy* decision because it is so at odds with this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), as to place the district court at risk of violating its duty to this Court's primacy in our judicial hierarchy.

In what can only be deemed an extraordinary decision that both supports Petitioner's position in this case and reinforces the strong dissent of Judge Merritt from the denial of rehearing *en banc*, the court in *Communities for Equity* found such a "serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*" that it could not follow *Brentwood Academy* and still be faithful to this Court's decision in *Tarkanian*. Petitioner will let the words of the court in *Communities for Equity* speak for themselves: The "Sixth Circuit's decision in *Brentwood Academy* misstates the Supreme Court's reasoning in *Tarkanian* [footnote 13]," *Communities for Equity*, 2000 U.S. Dist. LEXIS 574 at *40,[2] and for that reason it was

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[1] A copy of the decision in *Communities for Equity* is attached to this filing as an Appendix.

[2] The analysis of the district court for the Western District of Michigan in *Communities for Equity* regarding the doctrinal significance of footnote

deemed "not controlling." *Id.* at *41. The court in *Communities for Equity* asserted that it owed fealty to this Court's analysis in footnote 13 of *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), and not to "the *Brentwood Academy* decision ... [which] cannot be reconciled with Footnote 13 in *Tarkanian*...." 2000 U.S. Dist. LEXIS 574 at *41.

The critical state action issues raised by this case are worthy of certiorari, and Petitioner reiterates its position that this Court should grant certiorari. At the same time, the insubstantial character of Respondents' Brief in Opposition (BIO), as dramatically reinforced by the decision in *Communities for Equity*, suggests that this Court may deem the issues so definitively settled – and the decision of the Sixth Circuit Court of Appeals below such an outlier — that summary reversal would be an appropriate result in this case. Accordingly, Petitioner is also filing a Motion for Summary Reversal, urging that position on this Court as an alternative, more truncated route for resolution of this matter.

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13 in *Tarkanian* tracks the argument made by Petitioner in its Petition for Writ of Certiorari, at 21-25.

ARGUMENT

Respondents' Brief in Opposition *Supports* Petitioner's Position That There Is a Genuine Split in Circuits, With the Sixth Circuit Standing Apart From Circuits That Have Addressed the State Action Status of the Regulatory Conduct of Nominally Private Secondary School Athletic Associations

Once one weathers the *Sturm und Drang* of Respondents' BIO, one realizes that Respondents do not contest a fundamental contention of the Petition for Writ of Certiorari – that the decision of the Court of Appeals for the Sixth Circuit below is inconsistent with the decisions of other appellate courts that have addressed the issue. Notably, Respondents do not dispute that every other appellate court that has confronted the issue has held that the regulatory conduct of similarly constituted high school athletic associations is state action. *See* Petition for Writ of Certiorari at 7-10 & nn. 3-6. Instead, Respondents challenge the reasoning of and the respect due the decisions of all other appellate courts outside the Sixth Circuit that have addressed the state action issue at stake, and Respondents contend that those courts have decided the issue erroneously on the merits. The erroneous decisions, in Respondents' view, arise either from judicial negligence ("The entire discussion of state action was contained in one sentence," BIO at 7) or because they were handed down "prior to the *Blum* trilogy." BIO at 6.

Respondents' denigration of the authority of appellate court decisions on this state action issue outside the Sixth Circuit stems from Respondents' view that this Court's *Blum* trilogy in 1982 amounted to a constitutional epiphany. *See* BIO at 6 & n.3. Since 1982, however, courts in other jurisdictions continue to find state action in these types of cases, *see, e.g., Beck v. Missouri State High Sch. Activities Ass'n*, 837 F. Supp. 998, 1002 (E.D. Mo. 1993), *vacated as moot*, 18 F.3d 604 (8th Cir. 1994). Indeed, one case

denigrated by Respondents (BIO at 6 n.3) as having been decided before the *Blum* trilogy came down, *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968), was specifically cited with approval by this Court well after the *Blum* trilogy. *See NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

Respondents criticize other appellate authority, *e.g.*, *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982), because the court "included no mention of the *Blum* trilogy." BIO at 7. But, like *St. Augustine High School*, *supra*, *Clark* was expressly cited with approval by this Court in *Tarkanian*. 488 U.S. at 193 n.13.

In short, the reason that cases dealing with the state action status of the regulatory conduct of high school athletic associations have held that such conduct constitutes state action and have not found it necessary to engage in the kind of detailed analysis that Respondents would have liked is that the issue is regarded as settled law: "Actions of voluntary interscholastic athletic associations, of which public schools comprise part of the membership, constitute state action," *Dennin v. The Connecticut Interscholastic Athletic Conf., Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996). *See also Brewer v. Purvis*, 816 F. Supp. 1560, 1575 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir.), *cert. denied*, 514 U.S. 1111 (1995) (noting that "[t]raditionally, courts have found that high school athletic associations are state actors"); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996) ("Preliminarily, everyone agrees that the actions of Section VI constitute state action...."). As Judge Merritt noted in his dissent, the panel decision "does not recognize or discuss these authorities from other courts." Petition for Writ of Certiorari at 4-C.

If the *Blum* trilogy is to have the unsettling effect Respondents advocate on state action doctrine in the context of the regulatory conduct of nominally private high school athletic associations, then that presents a certworthy issue.

Respondents contend that all appellate court authority from outside the Sixth Circuit is erroneous because it fails to give adequate consideration to the impact of the *Blum* trilogy. If, despite this Court's statement in *Tarkanian*, 488 U.S. at 193 n.13, the *Blum* trilogy is to have such a far-reaching effect on the state action status of high school athletic associations, this Court should use this opportunity to consider and resolve that issue. Therefore, Respondents' BIO further strengthens the case for the granting of certiorari by this Court, and the district court decision in *Communities for Equity* places a dramatic exclamation point on the need for review by this Court.

CONCLUSION

If this Court agrees that the Sixth Circuit's decision below is inconsistent with decisions of other appellate courts which have confronted this state action issue, and if the Court also agrees that the issue raises important constitutional questions, then certainly it should grant certiorari. Similarly, if this Court agrees that the Court of Appeals' decision below is inconsistent with this Court's footnote 13 in *Tarkanian*, then it should grant certiorari. The district court decision in *Communities for Equity* is remarkable evidence that the decision below "cannot be reconciled with Footnote 13 in *Tarkanian*" and that "there appears to be a serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*." 2000 U.S. Dist. LEXIS 574 at *41.

Moreover, even if this Court accepts the position of Respondents that the *Blum* trilogy requires re-evaluation of what has been settled law outside the Sixth Circuit, it should grant certiorari to resolve the disagreement between the Sixth Circuit and other federal and state appellate courts on the state action issue. Otherwise, absent further analytical clarification, some courts might elect to follow *Brentwood Academy*, thereby "exalt[ing] form over substance" and not "inquir[ing] into the real and substantial legal acts"

associated with the regulatory conduct of high school athletic associations. *Id.* at *45. *See also* Petition for Writ of Certiorari, at 27-B (Tennessee Secondary School Athletic Association [TSSAA] regulates and controls interscholastic athletics and "[t]o hold otherwise would raise form over substance"). Were other courts to rely on *Brentwood Academy* in this fashion, it would result in an approach that is incompatible with this Court's admonition in state action cases that the "nature of [the] function" controls state action analysis. *See Polk County v. Dodson*, 454 U.S. 312, 321 (1981).[3]

Respectfully submitted,

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[3] The importance of a functional approach to analysis of state action issues, manifested in the decisions of this Court, is considered in the Petition for Writ of Certiorari, at 26-30.

APPENDIX A

COMMUNITIES FOR EQUITY, et al., Plaintiffs, v. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, et al., Defendants.

Case No. 1:98-CV-479

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2000 U.S. Dist. LEXIS 574

January 21, 2000, Decided

DISPOSITION: [*1] Defendants' motions for summary judgment denied.

COUNSEL: For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: H. Rhett Pinsky, Pinsky, Smith, Fayette & Hulswit, Grand Rapids, MI.

For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: Marcia D. Greenberger, The National Women's Law Center, Neena Chaudhry, Barbara A. Burr, National Women's Law Center, Washington, DC.

For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: Kristen Galles, Equity Legal, Alexandria, VA.

For MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, defendant: Edmund J. Sikorski, Ann Arbor, MI.

For JOHN ROBERTS, KEITH ALTO, GERALDINE DAVID, KEITH ELDRED, PAUL ELLINGER, ERIC FEDERICO,

DAN FLYNN, MARGRA GRILLO, ROBERT GRIMES, NORM JOHNSON, DEWAYNE JONES, DENNIS KNIOLA, WILLIAM NEWKIRK, THOMAS RASHID, ROBERT RIEMERSMA, RANDY SALISBURY, JOYCE SEALS, MICHAEL SHIBLER, CHRISTI BRILINSKI, EUNICE MOORE, defendants: William M. Azkoul, Azkoul & Azkoul, Grand Rapids, MI.

UNITED STATES OF AMERICA, amicus: Charles R. Gross, U.S. Attorney's Office, Grand Rapids, MI.

JUDGES: RICHARD ALAN ENSLEN, Chief Judge.

OPINION BY: RICHARD ALAN ENSLEN

OPINION:
Introduction [*2]

On June 26, 1998, Plaintiffs, consisting of the parents of two female student-athletes and an organization named Communities for Equity ("CFE"), filed a class action lawsuit alleging that the Michigan High School Athletic Association ("MHSAA") discriminated against female athletes. Plaintiffs allege that the discrimination took a variety of forms including: (1) providing more participation opportunities to boys than girls; (2) requiring girls to play in "non-traditional" seasons; (3) operating shorter seasons for girls than boys; (4) scheduling female athletes to compete on less desirable dates than their male counterparts; (5) providing inferior athletic facilities for girls athletic tournaments in comparison to boys athletic tournaments; (6) requiring girls to play in some sports under rules that differ from the rules of the National Collegiate Athletic Association ("NCAA"); and (7) allocating more resources to support and promote boys athletic programs.[1]

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[1]Plaintiffs filed an Amended Complaint on July 27, 1998.

[*3]

At this point in the litigation, Plaintiffs assert claims against the MHSAA and the individual members of the MHSAA Representative Council in their official capacity. Claims One and Two arise under Title IX of the Education Amendments of 1972, *20 U.S.C. §§ 1681* et seq., ("Title IX"). Claim Three arises under the Equal Protection Clause of the Fourteenth Amendment pursuant to *42 U.S.C. § 1983.* Claims Four and Five arise under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.3101 et. seq. Plaintiffs seek declaratory, injunctive and monetary relief.

There are three motions currently before the Court. The first motion is Defendants' Renewed Motion for Summary Judgment for Lack of Standing. The second is the Individual Defendants' Renewed Motion for Summary Judgment. The third is Defendant MHSAA's Supplemental Motion for Summary Judgment Pursuant to FRCP 56(c) as to the First and Second Claim of Plaintiffs and Motion Pursuant to FRCP 12(b)(6) as to Plaintiffs' Third Claim of Relief.

These motions raise four distinct issues. First, are Defendants properly subject to Title IX's requirements if they do not receive federal [*4] financial assistance? Second, are Defendants "state actors?" Third, do Plaintiffs have standing to sue? Fourth, even if Defendant MHSAA is subject to Title IX, may the Individual Defendants be sued in their official capacities?

Discussion

Summary judgment requires that the Court determine whether the Plaintiffs have presented enough evidence so that a jury could reasonably find for them. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Lapointe v. UAW, Local 600, 8 F.3d 376, 378 (6th Cir. 1993).* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson, 477 U.S. at 255.* In addition, when considering a summary judgment motion, the evidence of the non-movant is to be believed and [*5] all justifiable inferences are to be drawn in his favor. *Adickes v. Kress, 398 U.S. 144, 158-159, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1966).*

I. TITLE IX

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681*(a). A "program or activity" includes "all the operations of ... a college, university, or other post-secondary institution, or a public system of higher education .. any part of which is extended Federal financial assistance." *20 U.S.C. § 1687*(2)(A).

In most Title IX cases, the plaintiff attempts to demonstrate that the defendant is either a direct or indirect recipient of federal funds. See generally *Smith v. NCAA, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999); Dept. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986); Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984).* [*6] In this case,

however, there is no evidence that the MHSAA is either a direct or indirect recipient of federal funds. First, the MHSAA does not receive any direct assistance from the federal government. Second, the MHSAA receives the bulk of its funding from gate receipts generated at MHSAA-sponsored tournaments. Based upon this evidence, the MHSAA is neither a direct nor indirect recipient of federal funds. See generally *Smith, 119 S. Ct. at 929-930* (holding that NCAA was not an indirect recipient of federal funds even though it received dues from schools that received federal funds); *Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994)* (holding that Kentucky High School Athletic Association was an indirect recipient of federal funds because it was created by state law, its functions were determined by the Kentucky Board of Education, and it received dues from member schools who received federal funds); *Yellow Springs, etc. v. Ohio High Sch. Ath. Ass'n, 647 F.2d 651 (6th Cir. 1981)* (holding that Ohio High School Athletic Association was not a recipient of federal funds because it did not receive direct federal [*7] assistance, and it did not receive money from local schools who were recipients of federal assistance).

Although this might ordinarily end the Court's inquiry and justify a decision to grant Defendants' Motion for Summary Judgment, both Plaintiffs and the United States as amicus curiae argue that even-though the MHSAA is not a federal aid recipient, it is nonetheless subject to Title IX. The premise of this argument is that because local Michigan school districts have "ceded control" over interscholastic athletics to the MHSAA, and because interscholastic athletic programs receive federal financial assistance, MHSAA has control over a federally funded activity and should be subject to Title IX. This precise issue was left unresolved by the recent Supreme Court decision in Smith which explicitly declined to consider whether, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling

entity is covered by Title IX regardless [of] whether it is itself a recipient." *119 S. Ct. at 930.*

Given that the Supreme Court has left this issue unresolved, the Court believes that it must analyze two questions to resolve Defendants' motions [*8] relating to Title IX. First, as a matter of law, is the exercise of controlling authority over a federally funded program sufficient to trigger Title IX? Second, is there a genuine issue of material fact as to whether local Michigan school districts have ceded controlling authority over interscholastic athletics to the MHSAA, such that the MHSAA effectively controls those athletic programs? Each of these issues will be addressed in turn.

A. Legal Question

Turning first to the legal question, few courts have considered whether exercising "controlling authority" over a federally funded activity is sufficient to subject an entity to Title IX. See generally *Cureton v. NCAA, 37 F. Supp. 2d 687 (E.D.Pa. 1999)* (holding, in part, that the NCAA was subject to Title IX because it exercised controlling authority over athletic programs receiving federal financial assistance) rev'd *Cureton v. NCAA, 198 F.3d 107, 1999 WL 1241077 (3rd. Cir. 1999)* (holding that the NCAA did not exercise "controlling authority" over school athletic programs). See also *Kemether v. Penn. Interscholastic Athletic Assoc., 1999 U.S. Dist. LEXIS 17326, 1999 WL 1012948* (E.D.Pa. Nov. 8, 1999) (holding that Title [*9] IX subjects state athletic association to suit under the theory that association controls athletic programs receiving federal aid). For the reasons stated below, the Court does not find the reasoning in these non-controlling cases to be persuasive.

This Court's analysis begins with *Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946*

(1979). In Cannon, the Supreme Court was asked to determine whether Title IX implied a private right of action. In deciding this question, the Supreme Court engaged in an analysis of the history, subject matter, and purpose of Title IX. That analysis led the Supreme Court to two related conclusions. First, the Supreme Court concluded that the wording and purpose of Title IX indicated that it was enacted for the benefit of a particular class of people - those discriminated against on the basis of sex. *Id. at 689-91*. In reaching this conclusion, the Supreme Court explicitly rejected the proposition that Title IX was enacted "as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory [*10] practices." *Id. at 691-92*. Second, the Supreme Court recognized that Title IX "sought to accomplish two related, but nevertheless somewhat different objectives... Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Id. at 704*. In reaching this conclusion, the Supreme Court explained that a private right of action, in contrast to a suit brought by the federal government, was "fully consistent with - and in some cases even necessary to - the orderly enforcement of the statute." *Id. at 705-06*. Based upon this analysis, the Supreme Court concluded that Title IX implied a private cause of action.

Based in large part upon the Supreme Court's understanding of Title IX in Cannon, this Court is convinced that any entity which has controlling authority over a "program or activity receiving Federal financial assistance" is subject to Title IX's anti-discrimination rule, even if that entity does not itself receive the federal funds which finance the program or activity. In reaching this [*11] conclusion, the Court rejects Defendants' argument that only recipients of federal funds are

subject to Title IX because this interpretation is at odds with the plain meaning and purpose of the statute.

To begin with, Section 902 of Title IX does not, on its face, confine the list of potential defendants to "recipients" of federal funds. Instead, it simply prohibits discrimination "under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681*(a). While the most likely entity subject to this prohibition would be a school district that is a recipient of federal aid, there is nothing in the statute which limits the class of potential defendants to such recipients. Instead, the statute prohibits discrimination, presumably by anyone, "under any education program or activity receiving Federal financial assistance." Id.

This interpretation of the statute is supported by the Supreme Court's analysis in Cannon. In that case, the Supreme Court made it clear that Title IX did not simply ban discrimination by recipients of federal funds; it provides a remedy for individuals who have been discriminated against on the basis of [*12] sex in the operation of programs receiving federal aid. See Cannon, 441 U.S. £ 691-92. Defendants ask the Court to interpret Title IX as only applying to recipients of federal funds, but this is precisely the interpretation of Title IX that the Supreme Court seemed to reject in Cannon. Id.

Not only is Defendants' suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the Cannon decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal

funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Although the [*13] Court concludes that exercising "controlling authority" is sufficient to subject an entity to liability under Title IX, it must acknowledge that prior Supreme Court and Sixth Circuit precedent has implied that Title IX is only triggered if the defendant is a "recipient" of federal money. See *Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984)* (examining whether Grove City College was a recipient of federal financial assistance in order to determine whether it was subject to Title IX); *Dept. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986)* (stating that Congress limited the scope of § 504 of the Rehabilitation Act -- a statute with similar wording and history to Title IX -- to cover only entities that receive federal financial assistance); *Horner v. Kentucky High Sch. Ath. Ass'n, 43 F.3d 265 (6th Cir. 1994)* (examining extent to which Kentucky High School Athletic Association ("KHSAA") could be considered a recipient of federal financial assistance in order to determine whether it was subject to Title IX).[2]

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[2]As noted earlier, Section 902 of Title IX *(20 U.S.C. § 1681*(a)) does not use the term "recipient," although it does reference programs that "receive" federal funds. The Court suggests that one reason that courts have focused on "recipients" of federal funds is because entities that receive federal financial assistance will almost always be in control of those funds. Therefore, in the normal case, there is no need to inquire into who "controls" the funds. It is only in the rarest of cases, such as this one, where the entity that controls the federal funds and the entity that receives the federal funds are different, that the issue of control becomes important.

While the Court is mindful of these three decisions, it concludes that they are not conclusive on the issue currently before the Court. The Court reaches this conclusion for three reasons.

First, none of these cases explicitly considered the "controlling authority" rationale. Therefore, while these cases focused on whether certain defendants were appropriately considered recipients of federal funds, these cases did not explicitly hold that only recipients could be Title IX defendants. See *Smith, 119 S. Ct. at 929-930* (implying that the "controlling authority" theory of Title IX liability has not been addressed by the Supreme Court).

Second, the holdings in all three of these cases are logically consistent with the "controlling authority" theory of liability. See *Grove City, 465 U.S. at 563-570* (finding that Grove City College was a proper defendant under Title IX where it had obvious control over its own financial aid program which was funded, in part, by federal grants); *Paralyzed Veterans, 477 U.S. at 604-611* (finding that air carriers were not subject to Title IX where they had no control over program which developed airports [*15] and received federal aid); *Horner, 43 F.3d at 272* (finding that KHSAA was properly sued under Title IX where it had control over interscholastic athletic programs that were receiving federal financial assistance).

Third, the case which goes the furthest in implying that only recipients of federal funds may be subject to Title IX, Paralyzed Veterans, is inconsistent with the Supreme Court's explicit analysis in Cannon. In Paralyzed Veterans, the Supreme Court held that § 504 of the Rehabilitation Act only applied to recipients of federal funds, noted that § 504 and Title IX were similar statutes, and thereby implied that Title IX's requirements were similarly limited to recipients of federal aid.

See *Paralyzed Veterans, 477 U.S. at 605-606.* This implication, however, is at odds with the Supreme Court's analysis in Cannon that Title IX does more than simply prevent recipients of federal funds from discriminating on the basis of sex. See *Cannon 441 U.S. at 691-92, 704-06.* Therefore, whatever implication arises out of Paralyzed Veterans is trumped by the Supreme Court's explicit analysis in Cannon.

Therefore, [*16] because the plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds, because the Cannon decision makes it clear that Title IX was designed to prevent sex discrimination in programs that are financed by federal money (as opposed to merely stopping recipients of federal resources from discriminating), because the precedent of the Supreme Court and the Sixth Circuit is consistent with the "controlling authority" theory of liability, and because holding otherwise would be nothing more than empty formalism, the Court concludes that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.

B. Factual Question

Having concluded that "controlling authority" is a valid basis for Title IX liability, the Court turns to whether Plaintiffs have offered sufficient evidence that the MHSAA possesses the necessary authority to create a genuine issue of material fact. In order to sustain this burden, Plaintiffs point to a variety of factors. First, they point out that local school districts receive federal funds and therefore [*17] those districts' athletic programs are "programs or activities receiving Federal financial assistance . . .." See *20 U.S.C. § 1687*(2)(A). Second, they note that the MHSAA's stated purpose is "to create, establish and provide for, supervise and conduct interscholastic programs

throughout the state." Third, they argue that MHSAA promulgates rules and decisions that influence virtually every aspect of interscholastic athletics. Specifically, they point to: MHSAA's eligibility requirements, MHSAA's rules governing contests, MHSAA's rules relating to coaches, MHSAA's rules relating to the training of officials, MHSAA's decisions about the seasons in which certain sports will be played, MHSAA's rules relating to the number of practices that are allowed, and MHSAA's control over postseason competitions. In light of the fact that virtually every high school in Michigan is a member of MHSAA, each school agrees to be bound by the rules of MHSAA, and the MHSAA can impose sanctions on schools that violate its rules, the Plaintiffs argue that schools have ceded controlling authority over interscholastic athletics to the MHSAA.

In response, Defendants argue that MHSAA [*18] receives no money from its member schools either directly or indirectly. Furthermore, they point out that Michigan law vests a non-delegable duty to regulate interscholastic athletics in local school boards. More specifically, they counter Plaintiffs' assertion that local schools have ceded control over interscholastic athletics with the following facts: individual schools are solely responsible for decisions about what teams to sponsor, MHSAA rules must be formally adopted by local school districts, these districts are primarily responsible for enforcement, membership in MHSAA is voluntary, and local school districts often make and enforce rules that are more stringent than MHSAA rules. From Defendants' perspective, the relationship between school districts and the MHSAA is analogous to the relationship between adverse parties and an arbitrator. Defendants argue that the MHSAA simply provides member schools with a set of rules, which the member schools suggest and must formally adopt, so that a uniform set of rules can be obtained.

Essentially, Plaintiffs and Defendants disagree about what it means to "cede controlling authority." Plaintiffs assert that because the MHSAA makes the [*19] rules, it has controlling authority over interscholastic athletics -- even though the local school districts must formally ratify those rules. Defendants argue that MHSAA cannot have controlling authority over interscholastic athletics because a school district is only bound by MHSAA rules if that school district formally adopts those rules.

To resolve this disagreement, the Court begins with a review of the MHSAA and its historic role in interscholastic athletics. In 1924, the MHSAA was founded to "exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." 1978-90 MHSAA Handbook, Foreword. Prior to 1965, the Superintendent of Public Instruction was given supervision and control over interscholastic athletics by statute. See *School Code of 1955, 1955 PA 269* § 784. Then, in 1965, this authority was transferred to the State Board of Education via statute. Mich. Comp. Laws § 388.1014. From 1924 through 1974 the MHSAA appears to have been part of the state government, assisting either the Superintendent of Public Instruction or the State Board of Education in regulating [*20] interscholastic athletics.

In 1972, the Michigan legislature transferred authority over interscholastic athletics from the State Board of Education to the local school boards. In addition to transferring authority over interscholastic athletics in this manner, the Michigan legislature provided that:

The [MHSAA] is the official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and shall be responsible for the adoption and enforcement of rules relative to eligibility of

athletes in schools for participation in interschool athletic events, contests and tournaments.

Id. at § 380.1292(2). In addition to this "official designation," a representative of the State Board of Education was required to be a member of the MHSAA governing body. Id. at § 380.1292(1). In 1972, the MHSAA incorporated as a private association.

In 1995, the Michigan legislature again amended the statute. This time it removed MHSAA's official designation but explicitly provided that local school districts could "join organizations as part of performing the function of the school-district." Id. at § 380.11a(4). [*21] While the MHSAA's public or private status may have changed throughout the years, its basic function appears to have remained the same since its inception in 1924 -- create rules and policies for the regulation of interscholastic athletics in the state of Michigan.

Against this historical backdrop, the Court's analysis of the extent to which the MHSAA currently exercises control over interscholastic athletics begins with a review of the "MHSAA Handbook For 1999-2000 School Year" (Handbook). The forward to the Handbook provides, "the Michigan High School Athletic Association, Inc. is a private, voluntary association of public, private and parochial secondary schools . . .it is not necessary for any school to join the MHSAA in order to conduct a program of competitive athletics, and MHSAA member schools are not prohibited from engaging in competition against non-member schools . . . MHSAA is a self-supporting organization that does not rely on taxpayer dollars from any agency of the state or federal government. Schools do not pay membership dues, tournament entry fees, or service fees. When schools host MHSAA events they are reimbursed their itemized expenses and usually generate additional [*22] income from concession and program sales, parking fees, and

a portion of gate receipts. . .." Forward, MHSAA Constitution. The MHSAA Constitution goes on to provide that, "all high schools, junior high/middle schools, or other schools of Michigan . . . may become members of this organization . . .." Art. II, MHSAA Constitution. These provisions confirm Defendants' assertion that MHSAA is a private organization and that membership is purely voluntary. As such, these provisions go a long way in assuring the Court that the MHSAA does not exercise controlling authority over interscholastic athletics because the local schools can presumably disregard MHSAA rules, or exercise their option not to join the MHSAA, whenever they choose.

However, as the Court reads the MHSAA Handbook more closely, its initial assessment of the benign relationship between the MHSAA and local school districts is called into question. In the same forward that promises individual school districts that their membership in MHSAA is purely voluntary, MHSAA writes, " . . . schools adopt the Regulations and Interpretations of this Handbook as their own and agree to be primarily responsible for their enforcement. [*23] " (emphasis in original). This warning is then reiterated by the MHSAA Constitution which provides,

for a school to become a member of this organization, its board of education/governing body must complete the annual Membership Resolution stating that the board of education/governing body has adopted the organization's rules as its own and agrees to primary enforcement of such rules as to its own schools. Failure to implement required effects of policies and procedures promulgated by the organization to govern eligibility, competition and tournaments shall require that members of the administration and board of education/governing body appear before the [MHSAA] to show cause why the school is not in violation of the terms of its Membership Resolution.

Art. II, MHSAA Constitution. These provisions run contrary to the permissive and voluntary tone of the previously cited provisions and demand a closer examination of the relationship between the MHSAA and local school districts.

To uncover the precise nature of this relationship, it is necessary to examine the duties assigned to the Representative Council, the governing body of the MHSAA. The MHSAA Constitution provides: [*24]

Article VI -- Duties of the Council

Sec. 1. The Council shall have general control of interscholastic athletic policies.

Sec. 2. It shall make rules of eligibility for players.

Sec. 3. It shall make regulations for the conduct of interscholastic contests.

Sec. 4. It shall be the annual responsibility of the Council to ascertain that the Council elective process has provided for representation of females and minorities. If, in the judgment of the Council, these results have not been achieved, said Council shall not appoint not to exceed four Representative Council members-at-large for two-year terms.

Sec. 5. It may discipline member schools and contest officials for violations of rules and regulations

Sec. 6. It shall provide for the hearing of appeals from decisions of the Executive Director Sec. 7. It shall exercise all other functions necessary for carrying out the spirit and purpose of the Constitution.

Art. VI, MHSAA Constitution. Not only is the Representative Council given broad authority to regulate interscholastic athletics, a separate Due Process Procedure provides a complex process which governs "the investigation into alleged or contested violations [*25] by a party of the Constitution, By-Laws, regulations, rules, or interpretations of the MHSAA."

The Regulations provide lengthy eligibility requirements, limitations on the number of games that may be played, specifications of what type of officials may be used, rules for playing MHSAA sports, practice and scrimmage schedules, limitations on the number of games in which an athlete may participate in a given week, day, month, etc, maximum number of competitions allowable in a given year, a list of sanctions for a wide variety of violations, and a calendar of MHSAA sponsored state tournaments. These Regulations cover 51 pages of the Handbook.

A comprehensive review of the Handbook undercuts Defendants' assertion that MHSAA has no real control over interscholastic athletics. Defendants may be correct, as a technical matter, that the local schools must formally adopt MHSAA rules and enforce MHSAA policies, but this does not necessarily mean that MHSAA does not have control over those rules or policies. There is only one interscholastic athletic association in the state of Michigan and that is the MHSAA. In a very real sense, the MHSAA has a de facto monopoly over interscholastic sports. [*26] This is evidenced by the fact that there is not a single high school in the state of Michigan, that is eligible for MHSAA membership, that is not a member. While local school districts may have the power to disregard MHSAA rules or policies, and the legal authority to leave the Association altogether, these are not realistic options given the nature of interscholastic sports in Michigan. If a local school district were to disregard MHSAA rules, or leave the MHSAA, it would subject itself to MHSAA imposed sanctions (including possible expulsion), jeopardize its ability to compete in statewide tournaments, find it difficult to schedule opponents, and in general have problems providing interscholastic athletic programs to its students.

This explains why Defendants' reliance, on statements by the Michigan Attorney General and several state courts that

interscholastic sports is a "non-delegable" duty of the local school districts, is misplaced. While the regulation of interscholastic athletics under Michigan state law is "non-delegable," the local school districts have delegated it to the Defendants. Having delegated this duty, the local school districts have now lost the power to control [*27] interscholastic athletics independent from the MHSAA.

The evidence presented reveals a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics. Thus, summary judgment must be denied.[3]

> The Court believes that the potential inability to hold anyone accountable for alleged discrimination in a program receiving federal financial assistance is precisely why the ceding "controlling authority" is consistent with the purpose of Title IX. Without liability for those who control federal programs, such as interscholastic athletics, victims of discrimination are placed in an untenable dilemma clearly at odds with the spirit, purpose, and language of Title IX. On the one hand, these victims may seek a remedy from the athletic association, but that association will respond that it only makes "suggestions" to the local school districts, and that the local school districts have the real power to adopt and enforce policies and rules. On the other hand, these victims might go to the local school districts to address their problems, but these districts will respond that they are

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[3]The Court notes that the relief which the Plaintiffs seek cannot be obtained by suing the school districts directly. This is because the local school districts cannot unilaterally alter any policies of the MHSAA that are discriminatory. Assuming Plaintiffs allegations are true, the only way a local school districts could avoid whatever discrimination emanates from MHSAA policies would be to withdraw from the MHSAA. While this might end the discrimination, it would do so by depriving Plaintiffs of the ability to participate in interscholastic sports at all.

powerless to change the policies of the MHSAA on their own, and that the MHSAA holds all the real power over interscholastic athletics.

[*28]

II. EQUAL PROTECTION AND *42 U.S.C. § 1983*

Defendants also ask this Court to grant summary judgment in their favor with respect to Plaintiffs' *42 U.S.C. § 1983* claim. Defendants argue that the MHSAA is not a state actor and therefore cannot be liable under § 1983. Plaintiffs respond that the symbiotic relationship between the state of Michigan and the MHSAA is so pronounced that the MHSAA should be considered a state actor.

In the Sixth Circuit, "the principal inquiry in determining whether a private party is a "state actor" is whether the party's actions may be 'fairly attributable to the state.'" *Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992)* citing *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)*. The Supreme Court has created three tests to assist courts in making this determination. First, the public function test. See *West v. Atkins, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988)*. Second, the state compulsion test. *Adickes. v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*. [*29] Third, the symbiotic relationship or nexus test. *Burton v. Wilmington Parking Auth., 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961)*. The Supreme Court has suggested that these tests may be simply "different ways of characterizing the necessarily fact-bound inquiry that confronts the Court [when resolving state actor questions]." *Lugar, 457 U.S. at 939.*

The public function test asks whether "the private entity exercises powers which are traditionally exclusively reserved

to the state, such as holding elections, or eminent domain." *Wolotosky, 960 F.2d at 1335.* Although the United States, as amicus, argues that interscholastic sports in Michigan is a public function, this position is contradicted by the Sixth Circuit's analysis in *Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758, 763 (6th Cir. 1999).* In that case, the Sixth Circuit concluded, based upon the Supreme Court's decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 545, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987),* that interscholastic sports is not a power traditionally [*30] reserved to the state. Id. While this Court agrees with the United States that the State of Michigan has a long history of regulating interscholastic athletics (see I, B above), and that many of the cases and Michigan Attorney General opinions which Defendants cite indicate that interscholastic athletics is a "traditional government function," the Sixth Circuit's analysis in Brentwood is controlling.

The state compulsion test examines the extent to which the party seeking to establish state action can prove that the state so coerced or encouraged a private entity to act in a given way that the entity's action must be regarded as the choice of the state. *Wolotsky, 960 F.2d at 1335.* The Court believes that the MHSAA is a state actor pursuant to this test. The most persuasive argument supporting this conclusion is made by Defendants, albeit in the context of Title IX, where they argue that interscholastic athletics is a "non-delegable" duty of local school districts. According to Defendants, because all power over interscholastic athletics is held by the local districts, the MHSAA only acts at the will and direction of those districts. This characterization [*31] of the MHSAA-local school district relationship, added to the fact that the MHSAA is governed by a Representative Council comprised of primarily state employees (16 of the Representative Council members are public school employees and the Superintendent of Instruction

is an ex-officio member), combines to make a strong case that the MHSAA is a state actor pursuant to the state compulsion test.

While satisfaction of the state compulsion test is reason enough to conclude that the MHSAA is a state actor, the Court is even more convinced by application of the symbiotic relationship test. As the Sixth Circuit explained, "under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Wolotsky, 960 F.2d at 1335.*

There is no denying that there is a unique and close relationship between the MHSAA and the State of Michigan. Among other factors which define this relationship, the MHSAA is made up of primarily public schools,[4] public school employees [*32] are elected to serve on the Representative Council which oversees the MHSAA, school employees who desire to serve on the Representative Council must have approval from their principal or school district superintendent, the Michigan Superintendent of Public Instruction is an ex-officio member of the Representative Council, the MHSAA exercises tremendous influence and control over the rules and policies that regulate interscholastic athletics, MHSAA rules and policies are binding on all schools unless they withdraw from the MHSAA, and local school districts are primarily responsible for enforcing MHSAA rules and policies. Based upon similar factual circumstances linking state athletic associations to the state, a variety of Circuit Courts have found that these associations are state actors. See *Griffin High School v. Illinois High School Athletic Ass'n, 822 F.2d 671, 674 (7th*

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[4]In the 1998-1999 school year, the MHSAA was comprised of 617 public high schools and 114 private schools.

Cir. 1987); In Re: *United States ex. rel. Missouri State High School Activities Ass'n, 682 F.2d 147, 151 (8th Cir. 1982); Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982); Moreland v. Western Pennsylvania Interscholastic Athletic League, 572 F.2d 121, 125 (3rd Cir. 1978);* [*33] *Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 227 (5th Cir. 1968); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269, 273 (10th Cir. 1963).* If this were the only precedent on the issue, the Court would be hard-pressed to justify any conclusion other than that the MHSAA is a state actor. [5] However, before the Court reaches this conclusion, there are two reported decisions which demand close attention.

[*34]

In *Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758 (6th Cir. 1999),* the Sixth Circuit was asked to decide whether the Tennessee Secondary Athletic Association ("TSSAA") was a state actor when it enforced a rule against a private school, Brentwood Academy,

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[5]Defendants' argument that it is not a state actor, because it receives no state funds, is similar to its Title IX argument in that both ask the Court to exalt from over substance. The Supreme Court has repeatedly found, however, that when determining whether a private entity is a "state actor," courts should engage in a factual and pragmatic inquiry as opposed to an overly formalistic mode of analysis. See *Lugar, 457 U.S. at 939; Terry v. Adams, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953)* (rejecting formalistic application of the Fifteenth Amendment and holding that Jaybird Political Party was a state actor on the grounds that the Jaybird primary had the practical effect of determining who would win the general election and the party was created for the sole purpose of avoiding the Fifteenth Amendment and discriminating against blacks); *Smith v. Allwright, 321 U.S. 649, 661, 88 L. Ed. 987, 64 S. Ct. 757 (1944)* (holding that Texas Democratic Party was subject to the Fourteenth Amendment as a state actor and rejecting as a "slight . . .change in form" defendants' argument that because the Democratic Party was a private entity it was not a state actor).

that prohibited the school from using undue influence in recruiting student-athletes. The Sixth Circuit began by analyzing the structure and function of TSSAA which is strikingly similar to the MHSAA in this case.[6] The Sixth Circuit noted that: (1) the TSSAA was a voluntary organization, that authorized member schools to withdraw at any time; (2) the TSSAA was made up of public and private schools; (3) a Board of Control, made up of nine members elected from member schools, decided TSSAA policy; (4) at all relevant times the Board of Control was comprised of public high school administrators; (5) the TSSAA receives no state funding; (6) the TSSAA's revenue was generated from gate receipts at state tournaments and the TSSAA negotiated contracts with member schools for the use of their facilities to house these tournaments; and while a Tennessee Board of Education rule at one [*35] time designated the TSSAA to conduct interscholastic athletics, this rule was repealed in 1995.

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[6]There are only minor differences between the TSSAA and the MHSAA. First, whereas the TSSAA had nine members on the governing board, the MHSAA has 18. Second, whereas all members of the TSSAA Control Board were public school employees during the relevant time period, 16 of the 18 members of the MHSAA Representative Council were public school employees. Third and finally, whereas the TSSAA was "designated" by the Tennessee Board of Education to conduct interscholastic athletics until 1995, the MHSAA was statutory authorized to oversee interscholastic athletics until 1995 at which time Michigan state law was amended.

With these facts in mind, the court examined prior Sixth Circuit precedent and concluded that Brentwood Academy had failed to satisfy any of the three tests for determining when a private entity should be considered a state actor. In reaching this conclusion, the Sixth Circuit examined several of its prior [*36] decisions that had held that a state athletic association was a state actor. See *Yellow Springs v. Ohio High School Athletic Association, 647 F.2d 651 (6th Cir. 1981); Aldering v. Ohio High School Athletic Association, 779 F.2d 315 (6th Cir. 1985).* The Sixth Circuit concluded that these decisions were not controlling. *Brentwood Academy, 180 F.3d at 764-766.*

Additionally, the Sixth Circuit examined the extent to which a finding that TSSAA was not a state actor was consistent with Footnote 13 of the Supreme Court's decision in *NCAA v. Tarkanian, 488 U.S. 179, 193 n.13, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988).* The Sixth Circuit explained that while Tarkanian Footnote 13 indicated that high school athletic associations might potentially be state actors in relation to public schools, the same footnote indicates that "even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" *Brentwood Academy, 180 F.3d at 766* citing *Tarkanian 488 U.S. at 193 n. 13.* Therefore, the Sixth Circuit concluded that because [*37] Brentwood Academy was a private school, Footnote 13 did not require a finding that the TSSAA was a state actor. *Brentwood Academy, 180 F.3d at 766.*

This analysis misapplies the reasoning in Tarkanian. In Tarkanian, the Supreme Court was asked to decide whether the National Collegiate Athletic Association ("NCAA") was acting under color of state law when it conducted an investigation into athletic programs at the University of Nevada Las Vegas ("UNLV") and recommended to UNLV that it discipline its mens basketball coach, Jerry Tarkanian. In a 5-4 decision, the Supreme Court concluded that the NCAA was not a state actor.

The central issue in the case was whether the NCAA's recommendations, and UNLV's adverse employment actions, were so coordinated that they should be considered "joint actions" such that the NCAA was a state actor. *Tarkanian, 488 U.S. at 194-199.* Before analyzing this "joint action" issue, however, the majority opinion briefly examined whether UNLV exercised such control over the NCAA that all NCAA policies and actions were transformed into state actions. *Id. at 193.* The majority observed that the NCAA was made [*38]

up of colleges and universities from all across the country, and that UNLV had no more influence over the NCAA than other schools. Id. Therefore, because these colleges and universities outside of Nevada were not acting under color of Nevada state law, the NCAA's decisions and policies could not possibly be considered to be those of the state of Nevada. Id.

At this point, the majority inserted Footnote 13. *Id. at 193 n. 13.* The first sentence of the Footnote points out that the majority's analysis would be quite different in cases where an association's membership consisted entirely of schools from the same state, many of which were public institutions. Id. The majority then cited two circuit court decisions which found that state athletic associations were state actors. Id. In the second sentence of the Footnote, the majority notes that the dissenters accept the proposition that the NCAA is not a state actor when it takes "joint action" with a private university, and that the majority of the NCAA's membership is private schools. Id. The inference to be drawn from this second sentence is that because the dissenters accept the idea that "joint action" [*39] between the NCAA and a private university would not transform NCAA action into state action, and because the NCAA is made up of primarily private universities, the NCAA cannot be considered a state actor based upon its membership. The majority is using the dissents "joint action" analysis to reinforce its own conclusion that the NCAA cannot possibly be a state actor because of its membership.

The Tarkanian case required the Supreme Court to examine two independent state actor questions. First, the Supreme Court was required to briefly analyze in what instances an athletic association might be considered a state actor because its members controlled the association and those members were state actors. ("The membership question"). Second, the Supreme Court examined in what instances an athletic association should be considered a state actor when it engages

in joint activity with the state. ("The joint action question"). With these independent inquiries in mind, Footnote 13 appears to stand for three propositions. First, an athletic association made up of schools from across the country, the majority of which are private schools, is not a state actor because no one state controls [*40] the policy of the association. Second, if an association were made up of schools from the same state, and the majority of those schools were public, the association might well be a state actor. Third, while "joint action" between a public school and a private association might render the private association a state actor, joint action between a private school and a private association would not.

The Sixth Circuit's opinion in Brentwood Academy misstates the Supreme Court's reasoning in Tarkanian. The Sixth Circuit explained that the TSSAA was not a state actor, in part, because "all nine justices agree that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationship with private universities.'" *Brentwood Academy, 180 F.3d at 766* citing *Tarkanian 488 U.S. at 193 n. 13.* The problem with this analysis, however, is that this quoted line from Footnote 13 applies to the joint action question, not the membership question at issue in Brentwood Academy. In Brentwood Academy, the issue was not whether "joint action" between the TSSAA and Brentwood Academy [*41] transformed the TSSAA into a state actor, it was whether the TSSAA was a state actor because its members were primarily public schools, it was historically recognized by the state of Tennessee, and its Board was dominated by public school employees. As a result, there appears to be a serious disconnect between Tarkanian and the Sixth Circuit's reasoning in Brentwood Academy.

In the end, the Court concludes that the MHSAA is a state actor. The Court reaches this conclusion for four primary reasons. First, the actions of the MHSAA may be "fairly

attributed to the state" as evidenced by the fact that under the state compulsion test or the symbiotic relationship test, the MHSAA is a state actor. Second, the vast majority of circuit courts to consider this issue have concluded that state athletic associations such as the MHSAA are state actors. Third, the Brentwood Academy decision is not controlling in this case because (a) it cannot be reconciled with Footnote 13 in Tarkanian, and (b) by its own terms its analysis is limited to a unique factual situation - a private school alleging that a state athletic association is a state actor when it regulates that private school [*42] - not present here. Fourth, Footnote 13 of the Tarkanian decision indicates that the Supreme Court believes that state athletic associations, such as the MHSAA, are state actors. Therefore, the Equal Protection Clause claim survives Defendants' Motion for Summary Judgment and Motion to Dismiss.

III. Standing

Plaintiffs bear the burden of demonstrating standing. "To establish Article III standing to sue in federal court, an individual plaintiff must show that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision." *American Federation of Government Employees v. Clinton, 180 F.3d 727, 732 (6th Cir. 1999)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)).*

Organizations have standing to assert claims on behalf of members provided that three additional requirements are met. These requirements are "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations' purpose; [*43] and (c) neither the claim asserted nor the relief requested requires

the participation of individual members." *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977);* see also *American Federation, 180 F.3d at 732.*

In the context of a summary judgment motion, provided that there is sufficient evidence to create a genuine issue of material fact as to standing, the motion should be denied. See *Bennett v. Spear, 520 U.S. 154, 167, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997); Kardules v. City of Columbus, 95 F.3d 1335, 1346 (6th Cir. 1996).* The Court has previously examined standing issues in relation to Defendants' Motion to Dismiss. In the Opinion and Order which resolved that Motion, the Court held that Plaintiffs had presented enough evidence to survive the Motion to Dismiss. (Dkt. Nos. 44 and 45.) Although Defendants have offered subsequent evidence and argument which undermines the credibility of Plaintiffs' position on the standing issue, the Court remains convinced that there are genuine issues of material fact still in controversy. Therefore, for the reasons [*44] stated here and the Court's prior rulings, Defendants' Motion for Summary Judgement for Lack of Standing is denied.

IV. Liability for Individual Defendants

The Court has previously considered whether the individual Defendants may be sued in their official capacity. (Opinion and Order Dkt. Nos. 44 and 45.) Individuals who exercise administrative control over an entity which is subject to Title IX liability may be sued in their official capacity. See generally *Smith v. Metro Sch. Dist., 128 F.3d 1014, 1020 (7th Cir. 1997).* This is because official capacity suits represent another way of pleading an action against the entity represented by the individuals. *Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985).* In this case, there is no question that the MHSAA Representative Council has control

over the MHSAA. Therefore, to the extent that the MHSAA is a viable Title IX defendant, so to are the members of the MHSAA Representative Council. As such, summary judgment is denied.

Conclusion

In 1924, the MHSAA was created by the State of Michigan to regulate interscholastic athletics. Coincident to the passage [*45] of Title IX, the MHSAA incorporated itself to operate as a private association, although its functions remained largely the same. Then, in 1995, after the Sixth Circuit's decision in Horner, the State of Michigan removed the "official designation" of the MHSAA, though its membership and function again remained unchanged. Since then, the MHSAA has continued to exercise de facto control over interscholastic athletic programs in the state of Michigan.

The various formulations of the MHSAA appear to have been motivated by a desire to avoid the requirements of Title IX and the Equal Protection Clause, not to alter its mission or purpose. Since resolution of Defendants' motions require that this Court not exalt from over substance, and instead inquire into the real and substantial legal acts of the Defendants, their arguments cannot prevail.

DATED in Kalamazoo, MI:

Jan 21, 2000

RICHARD ALAN ENSLEN

Chief Judge

Supreme Court, U.S.
FILED
JAN 10 2000
CLERK

NO. 99-901

IN THE SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* MEMPHIS UNIVERSITY SCHOOL, ST. AGNES ACADEMY, CHRISTIAN BROTHERS HIGH SCHOOL, HUTCHISON SCHOOL, HARDING ACADEMY, LAUSANNE COLLEGIATE SCHOOL, ST. MARY'S EPISCOPAL SCHOOL, BRIARCREST CHRISTIAN SCHOOL, EVANGELICAL CHRISTIAN SCHOOL, AND FIRST ASSEMBLY CHRISTIAN SCHOOL

The Respondents, Tennessee Secondary School Athletic Association and Ronnie Carter, submit this response to the motion of *amici curiae* Memphis University School and others for leave to file a brief. The motion is not well taken and should be denied.

The state action argument on pages 11-20 of the proposed *amici curiae* brief does not bring to the attention of the Court any relevant matter not already brought to the Court's attention by the parties. This portion of the proposed brief recites various statements of fact purportedly made by the District Court in a written decision that is already before this Court. The brief then recites legal arguments that add nothing new to the arguments already

made by the Petitioner. Indeed, in some instances, the *amici curiae* simply rely upon arguments already made by the Petitioner.

Pages 4-10 of the proposed brief of *amici curiae* includes excerpts from handbooks, mission statements, and web pages of private schools. These excerpts are quoted in an effort to show the importance of athletics in those schools' programs. The importance that a given school may place on interscholastic athletic competition is simply not the issue before this Court. The issue is whether TSSAA is a state actor whose regulation of interscholastic athletic competition between its voluntary members is constrained by constitutional requirements and prohibitions.

The various excerpts quoted by *amici curiae* do provide some enlightenment, although the enlightenment does not pertain to the issue about which *amici curiae* seek to persuade the Court. In the context of this First Amendment challenge to the TSSAA recruiting rule, one of the excerpts quoted by *amici curiae* jumps from the page. That is the excerpt from the St. Agnes Academy handbook which speaks of the school's athletic programs "which are based on the teachings of Christ . . . ." This facet of the St. Agnes Academy athletic program is plainly one that a state actor could not regulate. The Christianity-based regulation of the St. Agnes Academy athletic program is a function of the academy alone. This excerpt from the mission statement points up the limited role that TSSAA plays. St. Agnes Academy decides what sort of athletic program it will conduct. TSSAA simply enforces its own rules of interscholastic competition should St. Agnes Academy decide that it wishes to conduct its program in accordance with those rules as a member of the association.

Amici curiae also quote from the web page of Girls Preparatory School, a private school in Tennessee. That web page, at *www.gps.edu*, reveals that swimming, diving, crew, and cheerleading are among the sports offered by GPS to its students. TSSAA does not regulate swimming, diving, crew, or cheerleading. The GPS web page thus shows that interscholastic athletic competition takes place between schools in Tennessee outside of or apart from any regulation by TSSAA. The same is revealed in the web page of *amicus curiae* Hutichson School, a private school in Tennessee. The Hutchison School web page, at *www.hutchisonschool.org*, includes the following information:

> "Hutchison's swim team will face tougher competition this year, having joined the Shelby County Swim League. Hutchison will compete against more private and county schools, including Germantown, Bartlett, Collierville, and Houston. The Sting will also swim four half-meets instead of three meets, a league championship and the state meet."

TSSAA does not regulate interscholastic athletic competition in the sport of swimming. *Amicus curiae* the Hutchison School will compete interscholastically, and will compete for a state championship, in swimming without any involvement on the part of TSSAA. The Hutchison School interscholastic swimming competition schedule, also included at its web page, shows that *amici curiae* Memphis University School, St. Agnes Academy, Christian Brothers High School, Lausanne Collegiate School, St. Mary's Episcopal School, Briarcrest Christian School, and Evangelical Christian School all participate in this interscholastic swimming competition with the Hutchison School, competition for state championships without any regulation by TSSAA.

The web pages of some of the schools outside of Tennessee are also revealing. For example. Haverford School, at *www.haverford.org*, shows that the school is a member of

the "Inter-Academic Athletic Association of Philadelphia and vicinity," referred to as the oldest high school league in the country. Haverford's web page does not mention the Pennsylvania Interscholastic Athletic Association, the counterpart of TSSAA. In addition, the web page does show that Haverford competes interscholastically in sports which the Pennsylvania Interscholastic Athletic Association does not regulate.

The web page of the Delbarton School, at *www.delbarton.org*, reflects that the Delbarton School engages in interscholastic athletic competition in New Jersey. The Delbarton School is a member of the parochial school division of the New Jersey State Interscholastic Athletic Association. Another New Jersey private school, Purnell School, with a web page at *www.purnell.org*, also engages in interscholastic athletic competition outside of the NJSIAA, the New Jersey counterpart to TSSAA. Purnell competes interscholastically in two athletic leagues, the New Jersey Association of Independent Schools Athletic Association and the New Jersey Prep Conference. Plainly, the NJSIAA is not "the only game in town."

The manner in which each of the *amici curiae* chooses to operate its athletic program is an individual school-based decision. It is up to the school whether to field teams for interscholastic athletic competition at all. Determination of sports in which it may compete is the school's decision. Whether it chooses to engage in sports competition independently, as a member of TSSAA, or as a member of some other association is solely the school's decision. Whether a private school may believe athletics plays an important role in the educational

process is inconsequential.[1] Such a belief does not turn interscholastic athletic competition into a necessary part of the public education provided by the state. Accordingly, such a belief does not turn the regulation of interscholastic athletic competition into a government function. There are no state laws in Tennessee, and *amici curiae* cite no state laws elsewhere, that require students to participate in interscholastic athletic competition or require schools to provide competitive interscholastic athletic programs.

The proposed brief of *amici curiae* adds nothing to the argument of the Petitioner. The information supplied by *amici curiae* is relevant, if at all, because it ultimately reveals that interscholastic athletic competition takes place in Tennessee and in other states outside of and apart from any regulation by TSSAA or any other particular association.

The proposed brief of *amici curiae* Memphis University School and others does not serve the purpose of an *amicus curiae* brief, burdens the Court, and should not be filed.

Respectfully submitted,

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[1] Many private schools, including some of the *amici curiae*, believe the teaching of Christian religious doctrine is also important in their educational process. Indeed, the Petitioner itself has a "spiritual" side to it's philosophy-defining triangle. *Amici curiae* certainly would not insist, however, that classes in Christian religion are therefore essential to any education, private or public.

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Response to Motion for Leave to File Brief of *Amici Curiae* have been supplied to G. Thomas Nebel, Esq., Law Offices of Tom Nebel, P.C., 501 Union Street, Suite 504, Nashville, Tennessee, 37219, H. Lee Barfield, Esq., Bass, Berry & Sims, PLC, 2700 First American Center, Nashville, Tennessee, 37238, James F. Blumstein, Esq., Professor of Law, Vanderbilt Law School, Nashville, Tennessee, 37240-0016, W. Thomas Hutton, Esq., Robert E. Orians, Esq., Shea Sisk Wellford, Esq., Martin, Tate, Morrow & Marston, P.C., 22 North Front Street, Suite 1100, Memphis, Tennessee, 38103-1182 on this 10th day of January, 2000.

Richard L. Colbert

MOTION FILED

FEB 1 1 2000

No. 99-901

IN THE
SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion For Summary Reversal

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Petitioner's Motion For Summary Reversal

INTRODUCTION

By filing this Motion for Summary Reversal, Petitioner suggests to this Court an alternative method for resolving this matter should it not deem the granting of certiorari appropriate.

This Motion is triggered in substantial part by a remarkable and very recent decision of the United States District Court for the Western District of Michigan, which is part of the Sixth Circuit: *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, [MHSAA] 2000 U.S. Dist. LEXIS 574 (W.D. Mich. January 21, 2000).[1] Although bound by the decision of the United States Court of Appeals for the Sixth Circuit in the instant case, the district court in *Communities for Equity* refused to follow the *Brentwood Academy* decision because it is so at odds with this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), as to place the district court at risk of violating its duty to this Court's primacy in our judicial hierarchy.

In what can only be deemed an extraordinary decision that both supports Petitioner's position in this case and reinforces the strong dissent of Judge Merritt from the denial of rehearing *en banc*, the court in *Communities for Equity* found such a "serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*" that it could not follow *Brentwood Academy* and still be faithful to this Court's decision in *Tarkanian*. Petitioner will let the words of the court in *Communities for Equity* speak for themselves: The "Sixth Circuit's decision in *Brentwood Academy* misstates the Supreme Court's reasoning in *Tarkanian* [footnote 13]," *Communities for Equity*, 2000

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[1] A copy of the decision in *Communities for Equity* is attached to this filing as an Appendix.

U.S. Dist. LEXIS 574 at *40,[2] and for that reason it was deemed "not controlling." *Id.* at *41. The court in *Communities for Equity* asserted that it owed fealty to this Court's analysis in footnote 13 of *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), and not to "the *Brentwood Academy* decision ... [which] cannot be reconciled with Footnote 13 in *Tarkanian*...." 2000 U.S. Dist. LEXIS 574 at *41.

The insubstantial character of Respondents' Brief in Opposition (BIO), as dramatically reinforced by the decision in *Communities for Equity*, suggests that this Court may deem the issues so definitively settled – and the decision of the Sixth Circuit Court of Appeals below such an outlier — that summary reversal would be an appropriate result in this case. This Motion supports the argument for summary reversal as an alternative, more truncated route for determination.

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[2] The analysis of the district court for the Western District of Michigan in *Communities for Equity* regarding the doctrinal significance of footnote 13 in *Tarkanian* tracks the argument made by Petitioner in its Petition for Writ of Certiorari, at 21-25.

ARGUMENT

I. As an Alternative to Granting Certiorari, This Court Could Summarily Reverse the Decision of the Sixth Circuit Because It Is Such an Outlier and Is Based on Circuit Precedent Whose Provenance Is Questionable

As support for summary reversal, it is important to note that Respondents contend that the "only post-*Blum* decisions in which a high school athletic association's state actor status has been analyzed, rather than simply accepted or assumed, both arise out of the Sixth Circuit." BIO at 8-9. Respondents' assertion is incorrect. The central Sixth Circuit precedent, upon which the panel below relied, is *Burrows v. Ohio High Sch. Athletic Ass'n*, 891 F.2d 122 (6th Cir. 1989). A careful analysis of *Burrows* and its doctrinal forebears is therefore appropriate to demonstrate the hollowness of Respondents' contention.

A. *Burrows*: The Background

The general principle that "[a]ctions of voluntary interscholastic athletic associations, of which public schools comprise part of the membership, constitute state action," *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996), has evolved from cases such as *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982), *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 653 (6th Cir. 1981) (cited in *Clark*), and *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-

28 (5th Cir. 1968). Footnote 13 of this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), a post-*Blum* case, definitively established this general principle, and subsequent decisions have adhered to this general principle. *See* Petition for Writ of Certiorari, at 8 n.3, 10 n.6, & 21 n.12. The *Blum* trilogy, decided in 1982 and so important for the Respondents, was never a basis for wholesale reassessment of the vitality of these precedents. Indeed, footnote 13 of *Tarkanian* completely refutes Respondents' contention regarding the analytical significance of *Blum*.

Prior to *Tarkanian*, the Sixth Circuit had found, both implicitly and explicitly, that the regulatory conduct of secondary school athletic associations constituted state action.

1. *Morris v. Michigan State Bd. of Educ.*

In *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973), a regulation of the MHSAA barred two high school girls from Ann Arbor Union High School from participating in interscholastic tennis matches on behalf of their school. Apparently, there was no girls' varsity tennis team at the school, and mixed-gender teams were prohibited by the MHSAA regulation. In response to an action under 42 U.S.C. §1983 brought by the girls, the district court issued a preliminary injunction invalidating the MHSAA rule and enjoining the MHSAA from "[p]reventing or obstructing in any way the individual plaintiffs or any other girls in the State of Michigan from participating fully in varsity interscholastic athletics and athletic contests because of their sex." *Id.* at 1208.

On appeal, the Sixth Circuit upheld the issuance of the preliminary injunction. In upholding the preliminary injunction, the Court of Appeals limited the scope of the preliminary injunction to cover only "non-contact" sports. *Id.* at 1209.

In the Court of Appeals, the MHSAA "disput[ed] the jurisdiction of the district court." *Id.* A jurisdictional

challenge is another way of framing the state action issue since, in a challenge under 42 U.S.C. §1983, a district court lacks jurisdiction in the absence of state action. *See Brenden v. Independent School Dist. 742*, 477 F.2d 1292, 1295 (8th Cir. 1973) ("The High School League first contends that there is no jurisdiction over it under 42 U.S.C. §1983 because it is a voluntary organization not acting under the color of state law").[3] In affirming the issuance of the preliminary injunction against the MHSAA, the Court of Appeals expressly held that "the District Court had and has jurisdiction of this case." 472 F.2d at 1209. The Sixth Circuit, therefore, squarely and necessarily addressed the state action issue in determining that the district court had jurisdiction to decide the case and to issue the preliminary injunction.

2. *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. OHSAA*.

In *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. OHSAA*, 647 F.2d 651 (6th Cir. 1981), two female students at Yellow Springs tried out for and made the boys' basketball team. They were not, however, permitted to participate in interscholastic competition because OHSAA barred interscholastic competition in coeducational basketball. Yellow Springs did not have a girls' basketball team at the time, and it sued OHSAA to invalidate the ban on coeducational basketball. The action was based on both statutory claims under Title IX, 20 U.S.C. §§1681 *et seq.*, and constitutional claims under §1983. The district court held that OHSAA operated under color of state law,

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[3] In finding that the Minnesota State High School League, an organization comparable to the MHSAA (and to TSSAA), acted under the color of state law and that a §1983 action was therefore "properly before a federal court to determine if the High School League's actions" comported with equal protection, the Eighth Circuit in *Brenden* cited and relied on *Morris* among other cases to support that state action conclusion. 477 F.2d at 1299.

explaining the nature of OHSAA's role, its composition, and the "entanglement, both actual and perceived, between individual schools and the OHSAA." *Id.* at 653.

On appeal, the Sixth Circuit approved the district court's state action holding: "The OHSAA's character as a semi-official in its activities and its symbiotic relationship with the state ... lead to the conclusion that the trial judge correctly found state action." *Id.* The concurrence "concur[red] with the majority's holding on state action." *Id.* at 661. On the merits, the Court of Appeals held that the OHSAA rule violated Title IX; however, it declined to reach the substantive merits of the constitutional claim against the OHSAA rule because the finding of a statutory violation made it "unnecessary to decide whether the [OHSAA] rule also violates the fourteenth amendment." *Id.* at 656 n.3.

3. *Alerding v. OHSAA*.

In *Alerding v. OHSAA*, 779 F.2d 315 (6th Cir. 1985), nonresident students challenged on constitutional grounds under §1983 an OHSAA rule that barred nonresident students from participating in Ohio interscholastic sports. The district court in *Alerding* noted that the "first hurdle plaintiffs must clear in order to succeed on their claim under 42 U.S.C. §1983 is to demonstrate that the action complained of is fairly attributable to the state." 591 F. Supp. 1538, 1540 (S.D. Ohio 1984). In the absence of state action, the district court would have no jurisdiction to adjudicate a §1983 action.

The district court held that the state action obstacle was "of little hindrance here as the Sixth Circuit has ruled that the OHSAA acts under color of state law for the purposes of organizing and regulating Ohio high school interscholastic athletics." *Id.* The district court in *Alerding* expressly and exclusively relied on the Sixth Circuit's previous decision in *Yellow Springs* for that proposition, which was an essential part of the court's §1983 analysis. *Id.* For the district court in *Alerding*, the state action analysis in

Yellow Springs was deemed binding precedent regarding the state action status of the OHSAA, the very same association involved in the *Yellow Springs* decision.

On appeal, the Sixth Circuit expressly affirmed the state action holding of the district court: "OHSAA is a state actor for purposes of §1983 because Ohio has implicitly delegated to OHSAA its power to regulate and organize interscholastic athletic activities." 779 F.2d at 316 n.1. Because OHSAA acted under the color of state law, "[t]he district court's jurisdiction was ... proper." *Id.* at n.2. As was the case with the district court, the Court of Appeals expressly and exclusively cited and relied on *Yellow Springs* as controlling authority on the state action issue. Resolution of the issue was deemed self-evident, so no extended analysis was necessary.

Thus, prior to *Tarkanian* and *Burrows*, the Sixth Circuit had twice found OHSAA to be a state actor, and it had, at least implicitly, found MHSAA, OHSAA's Michigan counterpart, to be a state actor. In this regard, the Sixth Circuit was in line with uniform precedent from other circuits on the state action issue regarding the regulatory conduct of high school athletic associations.

B. The *Burrows* Decision

Burrows was a constitutional challenge to a rule promulgated by OHSAA. In the district court, the parties "stipulate[d] that OHSAA's by-laws ... constituted state action." *Burrows v. OHSAA*, 891 F.2d 122, 125 (6th Cir. 1989). This stipulation was understandable in light of the Sixth Circuit's earlier decisions in *Yellow Springs* and *Alerding*, which had held that OHSAA was a state actor. Despite the stipulation, the panel in *Burrows*, apparently *sua sponte*, undertook to determine *de novo* and without a record whether OHSAA's regulatory conduct constituted state action. Contrary to the rulings in *Yellow Springs* and *Alerding*, the court in *Burrows* found OHSAA not to be a state actor.

As the panel below acknowledged, *Burrows* does not cite or even mention *Morris*, *Yellow Springs* or *Alerding*, even though *Yellow Springs* and *Alerding*, at least, involved the state action status of the same association. Petition for Writ of Certiorari, at 14-A, 2-C. Further, *Burrows* did not mention or cite this Court's decision the previous year in *Tarkanian*. Consequently, *Burrows* could not and did not deal with or distinguish the crucial analysis in footnote 13 of *Tarkanian*. Finally, *Burrows* fails to recognize the adverse and uniform precedent on the state action issue from other circuits.

In their BIO, Respondents assert that, with *Burrows*, the Sixth Circuit is the one circuit that analyzes and does not simply assume the state action status of the regulatory conduct of high school athletic associations such as TSSAA. BIO, at 8-9. In light of the provenance of *Burrows*, and its total disregard of controlling circuit and Supreme Court precedent on the issue, this claim is risible. *Burrows* created a circuit split and disregarded controlling precedent of this Court (*Tarkanian*) unwittingly – out of ignorance of precedent rather than out of reflective consideration of those authorities. Apparently, the state action issue had not been briefed by the parties, which had stipulated to the existence of state action in the district court.

The decision below in the instant case exacerbates the problem. The Sixth Circuit's reasoning relies on *Burrows* even though the Court of Appeals recognizes that *Burrows* did not consider relevant circuit precedent or this Court's decision in *Tarkanian*. By relying on *Burrows*, the court below does not consider decisions from other circuits and does not directly confront its creation of a split in circuits:

> [O]ur panel's holding that TSSAA is not a 'state actor' contradicts the uniform case law in the field from other circuits.... In addition, all of the several state supreme courts which have addressed the question have held that their high school interscholastic athletic associations are state actors. I find no circuit or state supreme court decision

supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts." Petition for Writ of Certiorari at 3-4-C (Merritt, J., dissenting from denial of rehearing *en banc*).

The panel decision below purports to deal with this Court's footnote 13 in *Tarkanian*. Petition for Writ of Certiorari, at 16-17-A. However, for the reasons so meticulously explained by the district court in *Communities for Equity* and outlined in the Petition for Writ of Certiorari (at 21-25), the Court of Appeals' treatment of footnote 13 in *Tarkanian* is analytically wanting. Indeed, it is so erroneous that the district court in *Communities for Equity* took the extraordinary measure of refusing to follow it, even though the decisions of the Court of Appeals for the Sixth Circuit are binding on the Michigan district court.

The district court in *Communities for Equity* believed (correctly) that it confronted a conflict between its fealty to the decisions of this Court and its obligation to follow the decisions of the Sixth Circuit. "Footnote 13 of the *Tarkanian* decision indicates that the Supreme Court believes that state athletic associations, such as MHSAA [and TSSAA] are state actors." 2000 U.S. Dist. LEXIS 574 at *42. But the Sixth Circuit's decision in *Brentwood Academy* had held otherwise, fundamentally misconstruing footnote 13 in *Tarkanian*. In the end, the district court concluded that it had a higher obligation to follow decisions of this Court. Therefore, faced with an "analysis [that] misapplies the reasoning in *Tarkanian*," *id.* at *37, and one that suffered from a "serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*," *id.* at *41, the district court in *Communities for Equity* concluded that the *Brentwood Academy* decision was "not controlling." *Id.*

Under the circumstances, a line of precedent whose provenance is so questionable and whose subsequent attempt at reconciliation with controlling precedent of this Court is so unpersuasive as to spawn a form of judicial nullification cannot be allowed to stand. If this Court chooses not to grant

certiorari, it should restore judicial integrity to this issue by summarily reversing the decision of the Sixth Circuit below.

CONCLUSION

Petitioner continues to believe that this case is certworthy and that this Court should grant review to give plenary consideration to the important state action issues that it raises. However, if the Court decides not to grant certiorari, it should grant this Motion for Summary Reversal to restore judicial integrity to the precedents of this Court and to maintain the integrity of settled doctrine established by this Court in *Tarkanian,* 488 U.S. 179, 198 n.13 (1988), and followed without exception by all other appellate courts to address the issue.

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APPENDIX A

COMMUNITIES FOR EQUITY, et al., Plaintiffs, v. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, et al., Defendants.

Case No. 1:98-CV-479

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2000 U.S. Dist. LEXIS 574

January 21, 2000, Decided

DISPOSITION: [*1] Defendants' motions for summary judgment denied.

COUNSEL: For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: H. Rhett Pinsky, Pinsky, Smith, Fayette & Hulswit, Grand Rapids, MI.

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For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: Kristen Galles, Equity Legal, Alexandria, VA.

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DAN FLYNN, MARGRA GRILLO, ROBERT GRIMES, NORM JOHNSON, DEWAYNE JONES, DENNIS KNIOLA, WILLIAM NEWKIRK, THOMAS RASHID, ROBERT RIEMERSMA, RANDY SALISBURY, JOYCE SEALS, MICHAEL SHIBLER, CHRISTI BRILINSKI, EUNICE MOORE, defendants: William M. Azkoul, Azkoul & Azkoul, Grand Rapids, MI.

UNITED STATES OF AMERICA, amicus: Charles R. Gross, U.S. Attorney's Office, Grand Rapids, MI.

JUDGES: RICHARD ALAN ENSLEN, Chief Judge.

OPINION BY: RICHARD ALAN ENSLEN

OPINION:
Introduction [*2]

On June 26, 1998, Plaintiffs, consisting of the parents of two female student-athletes and an organization named Communities for Equity ("CFE"), filed a class action lawsuit alleging that the Michigan High School Athletic Association ("MHSAA") discriminated against female athletes. Plaintiffs allege that the discrimination took a variety of forms including: (1) providing more participation opportunities to boys than girls; (2) requiring girls to play in "non-traditional" seasons; (3) operating shorter seasons for girls than boys; (4) scheduling female athletes to compete on less desirable dates than their male counterparts; (5) providing inferior athletic facilities for girls athletic tournaments in comparison to boys athletic tournaments; (6) requiring girls to play in some sports under rules that differ from the rules of the National Collegiate Athletic Association ("NCAA"); and (7) allocating more resources to support and promote boys athletic programs.[1]

---

[1]Plaintiffs filed an Amended Complaint on July 27, 1998.

[*3]

At this point in the litigation, Plaintiffs assert claims against the MHSAA and the individual members of the MHSAA Representative Council in their official capacity. Claims One and Two arise under Title IX of the Education Amendments of 1972, *20 U.S.C. §§ 1681* et seq., ("Title IX"). Claim Three arises under the Equal Protection Clause of the Fourteenth Amendment pursuant to *42 U.S.C. § 1983.* Claims Four and Five arise under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.3101 et. seq. Plaintiffs seek declaratory, injunctive and monetary relief.

There are three motions currently before the Court. The first motion is Defendants' Renewed Motion for Summary Judgment for Lack of Standing. The second is the Individual Defendants' Renewed Motion for Summary Judgment. The third is Defendant MHSAA's Supplemental Motion for Summary Judgment Pursuant to FRCP 56(c) as to the First and Second Claim of Plaintiffs and Motion Pursuant to FRCP 12(b)(6) as to Plaintiffs' Third Claim of Relief.

These motions raise four distinct issues. First, are Defendants properly subject to Title IX's requirements if they do not receive federal [*4] financial assistance? Second, are Defendants "state actors?" Third, do Plaintiffs have standing to sue? Fourth, even if Defendant MHSAA is subject to Title IX, may the Individual Defendants be sued in their official capacities?

Discussion

Summary judgment requires that the Court determine whether the Plaintiffs have presented enough evidence so that a jury could reasonably find for them. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Lapointe v. UAW, Local 600, 8 F.3d 376, 378 (6th Cir. 1993).* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson, 477 U.S. at 255.* In addition, when considering a summary judgment motion, the evidence of the non-movant is to be believed and [*5] all justifiable inferences are to be drawn in his favor. *Adickes v. Kress, 398 U.S. 144, 158-159, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1966).*

I. TITLE IX

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681*(a). A "program or activity" includes "all the operations of ... a college, university, or other post-secondary institution, or a public system of higher education .. any part of which is extended Federal financial assistance." *20 U.S.C. § 1687*(2)(A).

In most Title IX cases, the plaintiff attempts to demonstrate that the defendant is either a direct or indirect recipient of federal funds. See generally *Smith v. NCAA, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999); Dept. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986); Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984).* [*6] In this case,

however, there is no evidence that the MHSAA is either a direct or indirect recipient of federal funds. First, the MHSAA does not receive any direct assistance from the federal government. Second, the MHSAA receives the bulk of its funding from gate receipts generated at MHSAA-sponsored tournaments. Based upon this evidence, the MHSAA is neither a direct nor indirect recipient of federal funds. See generally *Smith, 119 S. Ct. at 929-930* (holding that NCAA was not an indirect recipient of federal funds even though it received dues from schools that received federal funds); *Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994)* (holding that Kentucky High School Athletic Association was an indirect recipient of federal funds because it was created by state law, its functions were determined by the Kentucky Board of Education, and it received dues from member schools who received federal funds); *Yellow Springs, etc. v. Ohio High Sch. Ath. Ass'n, 647 F.2d 651 (6th Cir. 1981)* (holding that Ohio High School Athletic Association was not a recipient of federal funds because it did not receive direct federal [*7] assistance, and it did not receive money from local schools who were recipients of federal assistance).

Although this might ordinarily end the Court's inquiry and justify a decision to grant Defendants' Motion for Summary Judgment, both Plaintiffs and the United States as amicus curiae argue that even though the MHSAA is not a federal aid recipient, it is nonetheless subject to Title IX. The premise of this argument is that because local Michigan school districts have "ceded control" over interscholastic athletics to the MHSAA, and because interscholastic athletic programs receive federal financial assistance, MHSAA has control over a federally funded activity and should be subject to Title IX. This precise issue was left unresolved by the recent Supreme Court decision in Smith which explicitly declined to consider whether, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling

entity is covered by Title IX regardless [of] whether it is itself a recipient." *119 S. Ct. at 930.*

Given that the Supreme Court has left this issue unresolved, the Court believes that it must analyze two questions to resolve Defendants' motions [*8] relating to Title IX. First, as a matter of law, is the exercise of controlling authority over a federally funded program sufficient to trigger Title IX? Second, is there a genuine issue of material fact as to whether local Michigan school districts have ceded controlling authority over interscholastic athletics to the MHSAA, such that the MHSAA effectively controls those athletic programs? Each of these issues will be addressed in turn.

A. Legal Question

Turning first to the legal question, few courts have considered whether exercising "controlling authority" over a federally funded activity is sufficient to subject an entity to Title IX. See generally *Cureton v. NCAA, 37 F. Supp. 2d 687 (E.D.Pa. 1999)* (holding, in part, that the NCAA was subject to Title IX because it exercised controlling authority over athletic programs receiving federal financial assistance) rev'd *Cureton v. NCAA, 198 F.3d 107, 1999 WL 1241077 (3rd. Cir. 1999)* (holding that the NCAA did not exercise "controlling authority" over school athletic programs). See also *Kemether v. Penn. Interscholastic Athletic Assoc., 1999 U.S. Dist. LEXIS 17326, 1999 WL 1012948* (E.D.Pa. Nov. 8, 1999) (holding that Title [*9] IX subjects state athletic association to suit under the theory that association controls athletic programs receiving federal aid). For the reasons stated below, the Court does not find the reasoning in these non-controlling cases to be persuasive.

This Court's analysis begins with *Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946*

(1979). In Cannon, the Supreme Court was asked to determine whether Title IX implied a private right of action. In deciding this question, the Supreme Court engaged in an analysis of the history, subject matter, and purpose of Title IX. That analysis led the Supreme Court to two related conclusions. First, the Supreme Court concluded that the wording and purpose of Title IX indicated that it was enacted for the benefit of a particular class of people - those discriminated against on the basis of sex. *Id. at 689-91*. In reaching this conclusion, the Supreme Court explicitly rejected the proposition that Title IX was enacted "as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory [*10] practices." *Id. at 691-92*. Second, the Supreme Court recognized that Title IX "sought to accomplish two related, but nevertheless somewhat different objectives... Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Id. at 704*. In reaching this conclusion, the Supreme Court explained that a private right of action, in contrast to a suit brought by the federal government, was "fully consistent with - and in some cases even necessary to - the orderly enforcement of the statute." *Id. at 705-06*. Based upon this analysis, the Supreme Court concluded that Title IX implied a private cause of action.

Based in large part upon the Supreme Court's understanding of Title IX in Cannon, this Court is convinced that any entity which has controlling authority over a "program or activity receiving Federal financial assistance" is subject to Title IX's anti-discrimination rule, even if that entity does not itself receive the federal funds which finance the program or activity. In reaching this [*11] conclusion, the Court rejects Defendants' argument that only recipients of federal funds are

subject to Title IX because this interpretation is at odds with the plain meaning and purpose of the statute.

To begin with, Section 902 of Title IX does not, on its face, confine the list of potential defendants to "recipients" of federal funds. Instead, it simply prohibits discrimination "under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681*(a). While the most likely entity subject to this prohibition would be a school district that is a recipient of federal aid, there is nothing in the statute which limits the class of potential defendants to such recipients. Instead, the statute prohibits discrimination, presumably by anyone, "under any education program or activity receiving Federal financial assistance." Id.

This interpretation of the statute is supported by the Supreme Court's analysis in Cannon. In that case, the Supreme Court made it clear that Title IX did not simply ban discrimination by recipients of federal funds; it provides a remedy for individuals who have been discriminated against on the basis of [*12] sex in the operation of programs receiving federal aid. See Cannon, 441 U.S. £ 691-92. Defendants ask the Court to interpret Title IX as only applying to recipients of federal funds, but this is precisely the interpretation of Title IX that the Supreme Court seemed to reject in Cannon. Id.

Not only is Defendants' suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the Cannon decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal

funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Although the [*13] Court concludes that exercising "controlling authority" is sufficient to subject an entity to liability under Title IX, it must acknowledge that prior Supreme Court and Sixth Circuit precedent has implied that Title IX is only triggered if the defendant is a "recipient" of federal money. See *Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984)* (examining whether Grove City College was a recipient of federal financial assistance in order to determine whether it was subject to Title IX); *Dept. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986)* (stating that Congress limited the scope of § 504 of the Rehabilitation Act -- a statute with similar wording and history to Title IX -- to cover only entities that receive federal financial assistance); *Horner v. Kentucky High Sch. Ath. Ass'n, 43 F.3d 265 (6th Cir. 1994)* (examining extent to which Kentucky High School Athletic Association ("KHSAA") could be considered a recipient of federal financial assistance in order to determine whether it was subject to Title IX).[2]

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[2]As noted earlier, Section 902 of Title IX *(20 U.S.C. § 1681*(a)) does not use the term "recipient," although it does reference programs that "receive" federal funds. The Court suggests that one reason that courts have focused on "recipients" of federal funds is because entities that receive federal financial assistance will almost always be in control of those funds. Therefore, in the normal case, there is no need to inquire into who "controls" the funds. It is only in the rarest of cases, such as this one, where the entity that controls the federal funds and the entity that receives the federal funds are different, that the issue of control becomes important.

While the Court is mindful of these three decisions, it concludes that they are not conclusive on the issue currently before the Court. The Court reaches this conclusion for three reasons.

First, none of these cases explicitly considered the "controlling authority" rationale. Therefore, while these cases focused on whether certain defendants were appropriately considered recipients of federal funds, these cases did not explicitly hold that only recipients could be Title IX defendants. See *Smith, 119 S. Ct. at 929-930* (implying that the "controlling authority" theory of Title IX liability has not been addressed by the Supreme Court).

Second, the holdings in all three of these cases are logically consistent with the "controlling authority" theory of liability. See *Grove City, 465 U.S. at 563-570* (finding that Grove City College was a proper defendant under Title IX where it had obvious control over its own financial aid program which was funded, in part, by federal grants); *Paralyzed Veterans, 477 U.S. at 604-611* (finding that air carriers were not subject to Title IX where they had no control over program which developed airports [*15] and received federal aid); *Horner, 43 F.3d at 272* (finding that KHSAA was properly sued under Title IX where it had control over interscholastic athletic programs that were receiving federal financial assistance).

Third, the case which goes the furthest in implying that only recipients of federal funds may be subject to Title IX, Paralyzed Veterans, is inconsistent with the Supreme Court's explicit analysis in Cannon. In Paralyzed Veterans, the Supreme Court held that § 504 of the Rehabilitation Act only applied to recipients of federal funds, noted that § 504 and Title IX were similar statutes, and thereby implied that Title IX's requirements were similarly limited to recipients of federal aid.

See *Paralyzed Veterans, 477 U.S. at 605-606.* This implication, however, is at odds with the Supreme Court's analysis in Cannon that Title IX does more than simply prevent recipients of federal funds from discriminating on the basis of sex. See *Cannon 441 U.S. at 691-92, 704-06.* Therefore, whatever implication arises out of Paralyzed Veterans is trumped by the Supreme Court's explicit analysis in Cannon.

Therefore, [*16] because the plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds, because the Cannon decision makes it clear that Title IX was designed to prevent sex discrimination in programs that are financed by federal money (as opposed to merely stopping recipients of federal resources from discriminating), because the precedent of the Supreme Court and the Sixth Circuit is consistent with the "controlling authority" theory of liability, and because holding otherwise would be nothing more than empty formalism, the Court concludes that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.

B. Factual Question

Having concluded that "controlling authority" is a valid basis for Title IX liability, the Court turns to whether Plaintiffs have offered sufficient evidence that the MHSAA possesses the necessary authority to create a genuine issue of material fact. In order to sustain this burden, Plaintiffs point to a variety of factors. First, they point out that local school districts receive federal funds and therefore [*17] those districts' athletic programs are "programs or activities receiving Federal financial assistance . . .." See *20 U.S.C. § 1687*(2)(A). Second, they note that the MHSAA's stated purpose is "to create, establish and provide for, supervise and conduct interscholastic programs

throughout the state." Third, they argue that MHSAA promulgates rules and decisions that influence virtually every aspect of interscholastic athletics. Specifically, they point to: MHSAA's eligibility requirements, MHSAA's rules governing contests, MHSAA's rules relating to coaches, MHSAA's rules relating to the training of officials, MHSAA's decisions about the seasons in which certain sports will be played, MHSAA's rules relating to the number of practices that are allowed, and MHSAA's control over postseason competitions. In light of the fact that virtually every high school in Michigan is a member of MHSAA, each school agrees to be bound by the rules of MHSAA, and the MHSAA can impose sanctions on schools that violate its rules, the Plaintiffs argue that schools have ceded controlling authority over interscholastic athletics to the MHSAA.

In response, Defendants argue that MHSAA [*18] receives no money from its member schools either directly or indirectly. Furthermore, they point out that Michigan law vests a non-delegable duty to regulate interscholastic athletics in local school boards. More specifically, they counter Plaintiffs' assertion that local schools have ceded control over interscholastic athletics with the following facts: individual schools are solely responsible for decisions about what teams to sponsor, MHSAA rules must be formally adopted by local school districts, these districts are primarily responsible for enforcement, membership in MHSAA is voluntary, and local school districts often make and enforce rules that are more stringent than MHSAA rules. From Defendants' perspective, the relationship between school districts and the MHSAA is analogous to the relationship between adverse parties and an arbitrator. Defendants argue that the MHSAA simply provides member schools with a set of rules, which the member schools suggest and must formally adopt, so that a uniform set of rules can be obtained.

Essentially, Plaintiffs and Defendants disagree about what it means to "cede controlling authority." Plaintiffs assert that because the MHSAA makes the [*19] rules, it has controlling authority over interscholastic athletics -- even though the local school districts must formally ratify those rules. Defendants argue that MHSAA cannot have controlling authority over interscholastic athletics because a school district is only bound by MHSAA rules if that school district formally adopts those rules.

To resolve this disagreement, the Court begins with a review of the MHSAA and its historic role in interscholastic athletics. In 1924, the MHSAA was founded to "exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." 1978-90 MHSAA Handbook, Foreword. Prior to 1965, the Superintendent of Public Instruction was given supervision and control over interscholastic athletics by statute. See *School Code of 1955, 1955 PA 269* § 784. Then, in 1965, this authority was transferred to the State Board of Education via statute. Mich. Comp. Laws § 388.1014. From 1924 through 1974 the MHSAA appears to have been part of the state government, assisting either the Superintendent of Public Instruction or the State Board of Education in regulating [*20] interscholastic athletics.

In 1972, the Michigan legislature transferred authority over interscholastic athletics from the State Board of Education to the local school boards. In addition to transferring authority over interscholastic athletics in this manner, the Michigan legislature provided that:

The [MHSAA] is the official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and shall be responsible for the adoption and enforcement of rules relative to eligibility of

athletes in schools for participation in interschool athletic events, contests and tournaments.

Id. at § 380.1292(2). In addition to this "official designation," a representative of the State Board of Education was required to be a member of the MHSAA governing body. Id. at § 380.1292(1). In 1972, the MHSAA incorporated as a private association.

In 1995, the Michigan legislature again amended the statute. This time it removed MHSAA's official designation but explicitly provided that local school districts could "join organizations as part of performing the function of the school district." Id. at § 380.11a(4). [*21] While the MHSAA's public or private status may have changed throughout the years, its basic function appears to have remained the same since its inception in 1924 -- create rules and policies for the regulation of interscholastic athletics in the state of Michigan.

Against this historical backdrop, the Court's analysis of the extent to which the MHSAA currently exercises control over interscholastic athletics begins with a review of the "MHSAA Handbook For 1999-2000 School Year" (Handbook). The forward to the Handbook provides, "the Michigan High School Athletic Association, Inc. is a private, voluntary association of public, private and parochial secondary schools . . .it is not necessary for any school to join the MHSAA in order to conduct a program of competitive athletics, and MHSAA member schools are not prohibited from engaging in competition against non-member schools . . . MHSAA is a self-supporting organization that does not rely on taxpayer dollars from any agency of the state or federal government. Schools do not pay membership dues, tournament entry fees, or service fees. When schools host MHSAA events they are reimbursed their itemized expenses and usually generate additional [*22] income from concession and program sales, parking fees, and

a portion of gate receipts. . .." Forward, MHSAA Constitution. The MHSAA Constitution goes on to provide that, "all high schools, junior high/middle schools, or other schools of Michigan . . . may become members of this organization . . .." Art. II, MHSAA Constitution. These provisions confirm Defendants' assertion that MHSAA is a private organization and that membership is purely voluntary. As such, these provisions go a long way in assuring the Court that the MHSAA does not exercise controlling authority over interscholastic athletics because the local schools can presumably disregard MHSAA rules, or exercise their option not to join the MHSAA, whenever they choose.

However, as the Court reads the MHSAA Handbook more closely, its initial assessment of the benign relationship between the MHSAA and local school districts is called into question. In the same forward that promises individual school districts that their membership in MHSAA is purely voluntary, MHSAA writes, " . . . schools adopt the Regulations and Interpretations of this Handbook as their own and agree to be primarily responsible for their enforcement. [*23] " (emphasis in original). This warning is then reiterated by the MHSAA Constitution which provides,

for a school to become a member of this organization, its board of education/governing body must complete the annual Membership Resolution stating that the board of education/governing body has adopted the organization's rules as its own and agrees to primary enforcement of such rules as to its own schools. Failure to implement required effects of policies and procedures promulgated by the organization to govern eligibility, competition and tournaments shall require that members of the administration and board of education/governing body appear before the [MHSAA] to show cause why the school is not in violation of the terms of its Membership Resolution.

Art. II, MHSAA Constitution. These provisions run contrary to the permissive and voluntary tone of the previously cited provisions and demand a closer examination of the relationship between the MHSAA and local school districts.

To uncover the precise nature of this relationship, it is necessary to examine the duties assigned to the Representative Council, the governing body of the MHSAA. The MHSAA Constitution provides: [*24]

Article VI -- Duties of the Council

Sec. 1. The Council shall have general control of interscholastic athletic policies.

Sec. 2. It shall make rules of eligibility for players.

Sec. 3. It shall make regulations for the conduct of interscholastic contests.

Sec. 4. It shall be the annual responsibility of the Council to ascertain that the Council elective process has provided for representation of females and minorities. If, in the judgment of the Council, these results have not been achieved, said Council shall not appoint not to exceed four Representative Council members-at-large for two-year terms.

Sec. 5. It may discipline member schools and contest officials for violations of rules and regulations

Sec. 6. It shall provide for the hearing of appeals from decisions of the Executive Director Sec. 7. It shall exercise all other functions necessary for carrying out the spirit and purpose of the Constitution.

Art. VI, MHSAA Constitution. Not only is the Representative Council given broad authority to regulate interscholastic athletics, a separate Due Process Procedure provides a complex process which governs "the investigation into alleged or contested violations [*25] by a party of the Constitution, By-Laws, regulations, rules, or interpretations of the MHSAA."

The Regulations provide lengthy eligibility requirements, limitations on the number of games that may be played, specifications of what type of officials may be used, rules for playing MHSAA sports, practice and scrimmage schedules, limitations on the number of games in which an athlete may participate in a given week, day, month, etc, maximum number of competitions allowable in a given year, a list of sanctions for a wide variety of violations, and a calendar of MHSAA sponsored state tournaments. These Regulations cover 51 pages of the Handbook.

A comprehensive review of the Handbook undercuts Defendants' assertion that MHSAA has no real control over interscholastic athletics. Defendants may be correct, as a technical matter, that the local schools must formally adopt MHSAA rules and enforce MHSAA policies, but this does not necessarily mean that MHSAA does not have control over those rules or policies. There is only one interscholastic athletic association in the state of Michigan and that is the MHSAA. In a very real sense, the MHSAA has a de facto monopoly over interscholastic sports. [*26] This is evidenced by the fact that there is not a single high school in the state of Michigan, that is eligible for MHSAA membership, that is not a member. While local school districts may have the power to disregard MHSAA rules or policies, and the legal authority to leave the Association altogether, these are not realistic options given the nature of interscholastic sports in Michigan. If a local school district were to disregard MHSAA rules, or leave the MHSAA, it would subject itself to MHSAA imposed sanctions (including possible expulsion), jeopardize its ability to compete in statewide tournaments, find it difficult to schedule opponents, and in general have problems providing interscholastic athletic programs to its students.

This explains why Defendants' reliance, on statements by the Michigan Attorney General and several state courts that

interscholastic sports is a "non-delegable" duty of the local school districts, is misplaced. While the regulation of interscholastic athletics under Michigan state law is "non-delegable," the local school districts have delegated it to the Defendants. Having delegated this duty, the local school districts have now lost the power to control [*27] interscholastic athletics independent from the MHSAA.

The evidence presented reveals a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics. Thus, summary judgment must be denied.[3]

> The Court believes that the potential inability to hold anyone accountable for alleged discrimination in a program receiving federal financial assistance is precisely why the ceding "controlling authority" is consistent with the purpose of Title IX. Without liability for those who control federal programs, such as interscholastic athletics, victims of discrimination are placed in an untenable dilemma clearly at odds with the spirit, purpose, and language of Title IX. On the one hand, these victims may seek a remedy from the athletic association, but that association will respond that it only makes "suggestions" to the local school districts, and that the local school districts have the real power to adopt and enforce policies and rules. On the other hand, these victims might go to the local school districts to address their problems, but these districts will respond that they are

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[3]The Court notes that the relief which the Plaintiffs seek cannot be obtained by suing the school districts directly. This is because the local school districts cannot unilaterally alter any policies of the MHSAA that are discriminatory. Assuming Plaintiffs allegations are true, the only way a local school districts could avoid whatever discrimination emanates from MHSAA policies would be to withdraw from the MHSAA. While this might end the discrimination, it would do so by depriving Plaintiffs of the ability to participate in interscholastic sports at all.

powerless to change the policies of the MHSAA on their own, and that the MHSAA holds all the real power over interscholastic athletics.

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II. EQUAL PROTECTION AND *42 U.S.C. § 1983*

Defendants also ask this Court to grant summary judgment in their favor with respect to Plaintiffs' *42 U.S.C. § 1983* claim. Defendants argue that the MHSAA is not a state actor and therefore cannot be liable under § 1983. Plaintiffs respond that the symbiotic relationship between the state of Michigan and the MHSAA is so pronounced that the MHSAA should be considered a state actor.

In the Sixth Circuit, "the principal inquiry in determining whether a private party is a "state actor" is whether the party's actions may be 'fairly attributable to the state.'" *Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992)* citing *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).* The Supreme Court has created three tests to assist courts in making this determination. First, the public function test. See *West v. Atkins, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988).* Second, the state compulsion test. *Adickes. v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).* [*29] Third, the symbiotic relationship or nexus test. *Burton v. Wilmington Parking Auth., 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961).* The Supreme Court has suggested that these tests may be simply "different ways of characterizing the necessarily fact-bound inquiry that confronts the Court [when resolving state actor questions]." *Lugar, 457 U.S. at 939.*

The public function test asks whether "the private entity exercises powers which are traditionally exclusively reserved

to the state, such as holding elections, or eminent domain." *Wolotosky, 960 F.2d at 1335.* Although the United States, as amicus, argues that interscholastic sports in Michigan is a public function, this position is contradicted by the Sixth Circuit's analysis in *Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758, 763 (6th Cir. 1999).* In that case, the Sixth Circuit concluded, based upon the Supreme Court's decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 545, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987),* that interscholastic sports is not a power traditionally [*30] reserved to the state. Id. While this Court agrees with the United States that the State of Michigan has a long history of regulating interscholastic athletics (see I, B above), and that many of the cases and Michigan Attorney General opinions which Defendants cite indicate that interscholastic athletics is a "traditional government function," the Sixth Circuit's analysis in Brentwood is controlling.

The state compulsion test examines the extent to which the party seeking to establish state action can prove that the state so coerced or encouraged a private entity to act in a given way that the entity's action must be regarded as the choice of the state. *Wolotsky, 960 F.2d at 1335.* The Court believes that the MHSAA is a state actor pursuant to this test. The most persuasive argument supporting this conclusion is made by Defendants, albeit in the context of Title IX, where they argue that interscholastic athletics is a "non-delegable" duty of local school districts. According to Defendants, because all power over interscholastic athletics is held by the local districts, the MHSAA only acts at the will and direction of those districts. This characterization [*31] of the MHSAA-local school district relationship, added to the fact that the MHSAA is governed by a Representative Council comprised of primarily state employees (16 of the Representative Council members are public school employees and the Superintendent of Instruction

is an ex-officio member), combines to make a strong case that the MHSAA is a state actor pursuant to the state compulsion test.

While satisfaction of the state compulsion test is reason enough to conclude that the MHSAA is a state actor, the Court is even more convinced by application of the symbiotic relationship test. As the Sixth Circuit explained, "under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Wolotsky, 960 F.2d at 1335.*

There is no denying that there is a unique and close relationship between the MHSAA and the State of Michigan. Among other factors which define this relationship, the MHSAA is made up of primarily public schools,[4] public school employees [*32] are elected to serve on the Representative Council which oversees the MHSAA, school employees who desire to serve on the Representative Council must have approval from their principal or school district superintendent, the Michigan Superintendent of Public Instruction is an ex-officio member of the Representative Council, the MHSAA exercises tremendous influence and control over the rules and policies that regulate interscholastic athletics, MHSAA rules and policies are binding on all schools unless they withdraw from the MHSAA, and local school districts are primarily responsible for enforcing MHSAA rules and policies. Based upon similar factual circumstances linking state athletic associations to the state, a variety of Circuit Courts have found that these associations are state actors. See *Griffin High School v. Illinois High School Athletic Ass'n, 822 F.2d 671, 674 (7th*

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[4]In the 1998-1999 school year, the MHSAA was comprised of 617 public high schools and 114 private schools.

Cir. 1987); In Re: *United States ex. rel. Missouri State High School Activities Ass'n, 682 F.2d 147, 151 (8th Cir. 1982); Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982); Moreland v. Western Pennsylvania Interscholastic Athletic League, 572 F.2d 121, 125 (3rd Cir. 1978);* [*33] *Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 227 (5th Cir. 1968); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269, 273 (10th Cir. 1963).* If this were the only precedent on the issue, the Court would be hard-pressed to justify any conclusion other than that the MHSAA is a state actor. [5] However, before the Court reaches this conclusion, there are two reported decisions which demand close attention.

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In *Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758 (6th Cir. 1999),* the Sixth Circuit was asked to decide whether the Tennessee Secondary Athletic Association ("TSSAA") was a state actor when it enforced a rule against a private school, Brentwood Academy,

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[5]Defendants' argument that it is not a state actor, because it receives no state funds, is similar to its Title IX argument in that both ask the Court to exalt from over substance. The Supreme Court has repeatedly found, however, that when determining whether a private entity is a "state actor," courts should engage in a factual and pragmatic inquiry as opposed to an overly formalistic mode of analysis. See *Lugar, 457 U.S. at 939; Terry v. Adams, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953)* (rejecting formalistic application of the Fifteenth Amendment and holding that Jaybird Political Party was a state actor on the grounds that the Jaybird primary had the practical effect of determining who would win the general election and the party was created for the sole purpose of avoiding the Fifteenth Amendment and discriminating against blacks); *Smith v. Allwright, 321 U.S. 649, 661, 88 L. Ed. 987, 64 S. Ct. 757 (1944)* (holding that Texas Democratic Party was subject to the Fourteenth Amendment as a state actor and rejecting as a "slight . . .change in form" defendants' argument that because the Democratic Party was a private entity it was not a state actor).

that prohibited the school from using undue influence in recruiting student-athletes. The Sixth Circuit began by analyzing the structure and function of TSSAA which is strikingly similar to the MHSAA in this case.[6] The Sixth Circuit noted that: (1) the TSSAA was a voluntary organization, that authorized member schools to withdraw at any time; (2) the TSSAA was made up of public and private schools; (3) a Board of Control, made up of nine members elected from member schools, decided TSSAA policy; (4) at all relevant times the Board of Control was comprised of public high school administrators; (5) the TSSAA receives no state funding; (6) the TSSAA's revenue was generated from gate receipts at state tournaments and the TSSAA negotiated contracts with member schools for the use of their facilities to house these tournaments; and (7) while a Tennessee Board of Education rule at one [*35] time designated the TSSAA to conduct interscholastic athletics, this rule was repealed in 1995.

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[6]There are only minor differences between the TSSAA and the MHSAA. First, whereas the TSSAA had nine members on the governing board, the MHSAA has 18. Second, whereas all members of the TSSAA Control Board were public school employees during the relevant time period, 16 of the 18 members of the MHSAA Representative Council were public school employees. Third and finally, whereas the TSSAA was "designated" by the Tennessee Board of Education to conduct interscholastic athletics until 1995, the MHSAA was statutory authorized to oversee interscholastic athletics until 1995 at which time Michigan state law was amended.

With these facts in mind, the court examined prior Sixth Circuit precedent and concluded that Brentwood Academy had failed to satisfy any of the three tests for determining when a private entity should be considered a state actor. In reaching this conclusion, the Sixth Circuit examined several of its prior [*36] decisions that had held that a state athletic association was a state actor. See *Yellow Springs v. Ohio High School Athletic Association, 647 F.2d 651 (6th Cir. 1981); Aldering v. Ohio High School Athletic Association, 779 F.2d 315 (6th Cir. 1985).* The Sixth Circuit concluded that these decisions were not controlling. *Brentwood Academy, 180 F.3d at 764-766.*

Additionally, the Sixth Circuit examined the extent to which a finding that TSSAA was not a state actor was consistent with Footnote 13 of the Supreme Court's decision in *NCAA v. Tarkanian, 488 U.S. 179, 193 n.13, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988).* The Sixth Circuit explained that while Tarkanian Footnote 13 indicated that high school athletic associations might potentially be state actors in relation to public schools, the same footnote indicates that "even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" *Brentwood Academy, 180 F.3d at 766* citing *Tarkanian 488 U.S. at 193 n. 13.* Therefore, the Sixth Circuit concluded that because [*37] Brentwood Academy was a private school, Footnote 13 did not require a finding that the TSSAA was a state actor. *Brentwood Academy, 180 F.3d at 766.*

This analysis misapplies the reasoning in Tarkanian. In Tarkanian, the Supreme Court was asked to decide whether the National Collegiate Athletic Association ("NCAA") was acting under color of state law when it conducted an investigation into athletic programs at the University of Nevada Las Vegas ("UNLV") and recommended to UNLV that it discipline its mens basketball coach, Jerry Tarkanian. In a 5-4 decision, the Supreme Court concluded that the NCAA was not a state actor.

The central issue in the case was whether the NCAA's recommendations, and UNLV's adverse employment actions, were so coordinated that they should be considered "joint actions" such that the NCAA was a state actor. *Tarkanian, 488 U.S. at 194-199.* Before analyzing this "joint action" issue, however, the majority opinion briefly examined whether UNLV exercised such control over the NCAA that all NCAA policies and actions were transformed into state actions. *Id. at 193.* The majority observed that the NCAA was made [*38]

up of colleges and universities from all across the country, and that UNLV had no more influence over the NCAA than other schools. Id. Therefore, because these colleges and universities outside of Nevada were not acting under color of Nevada state law, the NCAA's decisions and policies could not possibly be considered to be those of the state of Nevada. Id.

At this point, the majority inserted Footnote 13. *Id. at 193 n. 13.* The first sentence of the Footnote points out that the majority's analysis would be quite different in cases where an association's membership consisted entirely of schools from the same state, many of which were public institutions. Id. The majority then cited two circuit court decisions which found that state athletic associations were state actors. Id. In the second sentence of the Footnote, the majority notes that the dissenters accept the proposition that the NCAA is not a state actor when it takes "joint action" with a private university, and that the majority of the NCAA's membership is private schools. Id. The inference to be drawn from this second sentence is that because the dissenters accept the idea that "joint action" [*39] between the NCAA and a private university would not transform NCAA action into state action, and because the NCAA is made up of primarily private universities, the NCAA cannot be considered a state actor based upon its membership. The majority is using the dissents "joint action" analysis to reinforce its own conclusion that the NCAA cannot possibly be a state actor because of its membership.

The Tarkanian case required the Supreme Court to examine two independent state actor questions. First, the Supreme Court was required to briefly analyze in what instances an athletic association might be considered a state actor because its members controlled the association and those members were state actors. ("The membership question"). Second, the Supreme Court examined in what instances an athletic association should be considered a state actor when it engages

in joint activity with the state. ("The joint action question"). With these independent inquiries in mind, Footnote 13 appears to stand for three propositions. First, an athletic association made up of schools from across the country, the majority of which are private schools, is not a state actor because no one state controls [*40] the policy of the association. Second, if an association were made up of schools from the same state, and the majority of those schools were public, the association might well be a state actor. Third, while "joint action" between a public school and a private association might render the private association a state actor, joint action between a private school and a private association would not.

The Sixth Circuit's opinion in Brentwood Academy misstates the Supreme Court's reasoning in Tarkanian. The Sixth Circuit explained that the TSSAA was not a state actor, in part, because "all nine justices agree that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationship with private universities.'" *Brentwood Academy, 180 F.3d at 766* citing *Tarkanian 488 U.S. at 193 n. 13.* The problem with this analysis, however, is that this quoted line from Footnote 13 applies to the joint action question, not the membership question at issue in Brentwood Academy. In Brentwood Academy, the issue was not whether "joint action" between the TSSAA and Brentwood Academy [*41] transformed the TSSAA into a state actor, it was whether the TSSAA was a state actor because its members were primarily public schools, it was historically recognized by the state of Tennessee, and its Board was dominated by public school employees. As a result, there appears to be a serious disconnect between Tarkanian and the Sixth Circuit's reasoning in Brentwood Academy.

In the end, the Court concludes that the MHSAA is a state actor. The Court reaches this conclusion for four primary reasons. First, the actions of the MHSAA may be "fairly

attributed to the state" as evidenced by the fact that under the state compulsion test or the symbiotic relationship test, the MHSAA is a state actor. Second, the vast majority of circuit courts to consider this issue have concluded that state athletic associations such as the MHSAA are state actors. Third, the Brentwood Academy decision is not controlling in this case because (a) it cannot be reconciled with Footnote 13 in Tarkanian, and (b) by its own terms its analysis is limited to a unique factual situation - a private school alleging that a state athletic association is a state actor when it regulates that private school [*42] - not present here. Fourth, Footnote 13 of the Tarkanian decision indicates that the Supreme Court believes that state athletic associations, such as the MHSAA, are state actors. Therefore, the Equal Protection Clause claim survives Defendants' Motion for Summary Judgment and Motion to Dismiss.

III. Standing

Plaintiffs bear the burden of demonstrating standing. "To establish Article III standing to sue in federal court, an individual plaintiff must show that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision." *American Federation of Government Employees v. Clinton, 180 F.3d 727, 732 (6th Cir. 1999)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992))*.

Organizations have standing to assert claims on behalf of members provided that three additional requirements are met. These requirements are "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations' purpose; [*43] and (c) neither the claim asserted nor the relief requested requires

the participation of individual members." *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977);* see also *American Federation, 180 F.3d at 732.*

In the context of a summary judgment motion, provided that there is sufficient evidence to create a genuine issue of material fact as to standing, the motion should be denied. See *Bennett v. Spear, 520 U.S. 154, 167, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997); Kardules v. City of Columbus, 95 F.3d 1335, 1346 (6th Cir. 1996).* The Court has previously examined standing issues in relation to Defendants' Motion to Dismiss. In the Opinion and Order which resolved that Motion, the Court held that Plaintiffs had presented enough evidence to survive the Motion to Dismiss. (Dkt. Nos. 44 and 45.) Although Defendants have offered subsequent evidence and argument which undermines the credibility of Plaintiffs' position on the standing issue, the Court remains convinced that there are genuine issues of material fact still in controversy. Therefore, for the reasons [*44] stated here and the Court's prior rulings, Defendants' Motion for Summary Judgement for Lack of Standing is denied.

IV. Liability for Individual Defendants

The Court has previously considered whether the individual Defendants may be sued in their official capacity. (Opinion and Order Dkt. Nos. 44 and 45.) Individuals who exercise administrative control over an entity which is subject to Title IX liability may be sued in their official capacity. See generally *Smith v. Metro Sch. Dist., 128 F.3d 1014, 1020 (7th Cir. 1997).* This is because official capacity suits represent another way of pleading an action against the entity represented by the individuals. *Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985).* In this case, there is no question that the MHSAA Representative Council has control

over the MHSAA. Therefore, to the extent that the MHSAA is a viable Title IX defendant, so to are the members of the MHSAA Representative Council. As such, summary judgment is denied.

Conclusion

In 1924, the MHSAA was created by the State of Michigan to regulate interscholastic athletics. Coincident to the passage [*45] of Title IX, the MHSAA incorporated itself to operate as a private association, although its functions remained largely the same. Then, in 1995, after the Sixth Circuit's decision in Horner, the State of Michigan removed the "official designation" of the MHSAA, though its membership and function again remained unchanged. Since then, the MHSAA has continued to exercise de facto control over interscholastic athletic programs in the state of Michigan.

The various formulations of the MHSAA appear to have been motivated by a desire to avoid the requirements of Title IX and the Equal Protection Clause, not to alter its mission or purpose. Since resolution of Defendants' motions require that this Court not exalt from over substance, and instead inquire into the real and substantial legal acts of the Defendants, their arguments cannot prevail.

DATED in Kalamazoo, MI:

Jan 21, 2000

RICHARD ALAN ENSLEN

Chief Judge

(19)

Supreme Court, U.S.
FILED
MAY 22 2000
CLERK

No. 99-901

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 22, 1999
CERTIORARI GRANTED FEBRUARY 22, 2000

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Plaintiff's Response to Defendants' Statement of Undisputed Facts [exhibits omitted] JA-68

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Excerpts from Official Compilation of Rules and Regulations of the State of Tennessee [† indicates version of Rule in effect at the time of challenged conduct] JA-220

Excerpts from Deposition of Ronnie Carter [exhibits omitted] JA-264

Excerpts from Deposition of William B. Brown [exhibits omitted except Exhibits 12, 13, 19, 21, 22] JA-270

Excerpt from Deposition of Lynn Brown [exhibits omitted] JA-298

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The following documents were reproduced in the Appendix to the Petition for Writ of Certiorari:

A. Judgment and opinion of the Sixth Circuit Court of Appeals (June 21, 1999) 1-A

B. Order and Memorandum of the U.S. District Court (M.D. Tenn.) (July 2, 1998) 1-B

C. Judgment and Opinion of the Sixth Circuit Court of Appeals Denying Rehearing *En Banc* (August 30, 1999) 1-C

D. Constitutional and Statutory Provisions 1-D

E. Brief of Amicus Curiae Chester E. Finn, Jr. and Daniel Casse in Support of Plaintiff/Appellee Brentwood Academy's Petition for Rehearing *En Banc* 1-E

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No: 3-97-1249

Date	No.	Proceedings
12/12/97	1	COMPLAINT w/att'd exhibits A-G. Filing fee paid in the amount of: $150, receipt #61078 [Entry date 12/15/97]
1/7/98	8	ANSWER by defts to [1-1] (dm) [Entry date 1/8/98]
6/1/98	24	COMBINED STIPULATIONS, submitted by parties w/attached exhibits A-E (tlc)
6/1/98	25	MOTION by pltf Brentwood Academy for leave to file an Amended Cmp (w/exhibit) (dm) [Entry date 6/2/98]
6/1/98	27	MOTION by pltf Brentwood Academy for partial summary judgment, for permanent injunction (dm) [Entry date 6/2/98]
6/1/98	28	MEMORANDUM OF LAW by pltf in support of motion for partial summary judgment [27-1], of motion for permanent injunction [27-2] (dm) [Entry date 6/2/98]
6/1/98	29	APPENDIX (1 thru 15) filed by pltf re [28-1] (dm) [Entry date 6/2/98]

Date	No.	Proceedings
6/1/98	30	AFFDAVIT of Carlton Flatt re [27-1], re [27-2] (dm) [Entry date 6/2/98]
6/1/98	31	STATEMENT of facts by pltf Brentwood Academy in support of [27-1], in support of [27-2] (w/attachments A thru Q) (dm) [Entry date 6/2/98]
6/10/98	33	AMENDED MEMORANDUM OF LAW by pltf in support of motion for partial summary judgment [27-1] (ts) [Entry date 6/11/98]
6/26/98	39	ORDER by Judge Todd J. Campbell denying motion to strike [6-1]; denying mtn for leave to file an Amended Cmp [25-1] (EOD 6/26/98) (cc: all counsel) (ts)
6/30/98	45	RESPONSE by defts' TN Secondary School, & Ronnie Carter to motion for partial summary judgment [27-1] (jb) [Entry date 7/1/98]
6/30/98	46	RESPONSE by defts' TN Secondary School, & Ronnie Carter to Statement of Undisputed Material Facts [31-1] (jb) [Entry date 7/1/98]
6/30/98	47	MOTION by defts' TN Secondary School, & Ronnie Carter for summary judgment (jb) [Entry date 7/1/98]

Date	No.	Proceedings
6/30/98	48	MEMORANDUM by defts' TN Secondary School, & Ronnie Carter in support of motion for summary judgment [47-1] (w/ attachment) (jb) [Entry date 7/1/98]
6/30/98	49	STATEMENT of undisputed facts by defts' TN Secondary School & Ronnie Carter in support of [47-1] (jb) [Entry date 7/1/98]
7/15/98	68	REPLY by pltf in support of partial summary judgment [27-1] w/response to deft's mtn for summary jgm (attachments A-C) (ts)
7/15/98	68	RESPONSE by pltf to deft's mtn for summary jgm [47-1] (ts)
7/15/98	69	APPENDIX (1-16) filed by pltf to reply in support of partial summary jgm [68-1] (ts)
7/15/98	70	RESPONSE by pltf to defts' statement of undisputed facts [441-1] [49-1] (attachments A-D) (ts)
7/15/97	79	MEMORANDUM by pltf Brentwood Academy in opposition to motion for summary judgment [47-1] (tlc)

Date	No.	Proceedings
7/15/98	81	APPENDIX filed by pltf Brentwood Academy re memorandum in opposition to defts' TSSAA & Carter's motion for summary judgment on the state claims [79-1] (w/attached exhs. 1-12) (jb) [Entry date 7/16/98]
7/22/98	89	MEMORANDUM by pltf Brentwood Academy regarding deft Carter's participation in TSSAA Board of Control Hearing of 8/23/97 (jb)
7/22/98	90	MOTION by pltf Brentwood Academy for leave to file amended complaint and memorandum in support thereof (w/attached proposed order) (jb)
7/24/98	97	RESPONSE by defts to pltf's motion for leave to file amended complaint and memorandum in support thereof [90-1]; w/attachments (tlc)
7/24/98	98	RESPONSE by defts to pltf's memorandum re deft Carter's participation in 8/23/97 TSSAA Board of Control Hearing [89-1] (tlc)
7/29/98	104	MEMORANDUM OF THE COURT (cc: all counsel) (EOD 7/29/98) (tlc)

Date	No.	Proceedings
7/29/98	105	ORDER by Judge Todd J. Campbell; court heard oral argument on the following pending motions on 7/16/98; granting in part and denying in part defts' motion for summary judgment [47-1]; granted as to pltf's equitable estoppel claim and that claim is dismissed; granting in part and denying part pltf Brentwood Academy's motion for partial summary judgment and for permanent injunction; granted as to claim that TSSAA's Recruiting Rule violates the 1st Amendment on its face and as applied to Brentwood Academy; defts are hereby enjoined from any use of the Recruiting Rule; all sanctions imposed by the TSSAA to Brentwood Academy, DE #1, Ex. G, are void and unenforceable; the disposition of other issues presented by the pending motions is discussed in the memorandum (cc: all counsel) (EOD 7/29/98) (tlc)
7/30/98	106	NOTICE OF APPEAL by deft TN Secondary School, Ronnie Carter from Dist. Court decision [105-1] (mg) [Entry date 8/3/98]

Date	No.	Proceedings
6/23/99	118	INFORMATION COPY from 6th CCA: We REVERSE the district court's grant of sumjgm in favor of Brentwood, VACATE the injunction, and REMAND the case for further proceedings consistent with this opinion. (mg) [Entry date 6/24/99]
6/23/99	119	JUDGMENT 6CCA: District court jgm is REVERSED, injunction is VACATED, and the case is REMANDED to the district court. (mg) [Entry date 6/24/99]
9/13/99	121	ORDER from 6th CCA denying petition for rehearing. (mg) [Entry date 9/14/99]
9/13/99	122	MANDATE from 6th CCA vacating, reversing and remanding the matter back to District Court [Appeal [118-1] pursuant to the court's info order filed 6/21/99.] (mg) [Entry date 9/14/99]
12/15/99	124	NOTICE by U.S. Supreme Court of filing of petition for writ of cert on 11/29/99. (mg)
2/28/00	125	ORDER by U.S. Supreme Court: Mtn of Memphis Univ. School, et al for leave to file brief as amicus curiae is granted; mtn of petitioner for summary reversal is denied. The petition for writ of cert is granted. (mg) [Entry date 3/2/00]

RELEVANT DOCKET ENTRIES

COURT OF APPEALS DOCKET NO. 98-6113
FILED: 8/21/98

Date	Proceedings
8/21/98	Civil Case Docketed. Notice filed by Appellant TN Secondary School, Appellant Ronnie Carter. Transcript needed: y (yh)
8/21/98	Appellant MOTION filed to expedite appeal. Motion filed by Richard L. Colbert and Charles Hampton White for Appellant Ronnie Carter, Appellant TN Secondary School. Certificate of service date 8/7/98 [98-6113] (yh)
8/25/98	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 9/17/98; appellee brief due 10/13/98; reply brief due 10/27/98; appendix due 11/2/98; final briefs due 11/16/98. . (yh)
9/21/98	PROOF BRIEF filed by Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 9/17/98. Number of Pages: 53. [98-6113] (teb)
9/21/98	Request to require oral argument filed by Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School [98-6113] (teb)

Date	Proceedings
9/30/98	MOTION filed to allow National Federation of State High School Associations to become an amicus curiae. Motion filed by John J. Kitchin for Natl Fedn St High. Certificate of service date 9/24/98. [98-6113] (yh)
9/30/98	AMICUS BRIEF TENDERED. Received from John J. Kitchin for Natl Fedn St High [98-6113]. Certificate of service date 9/24/98 (yh)
10/15/98	PROOF BRIEF filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 10/13/98. Number of Pages: 119. [98-6113] (teb)
10/15/98	Request to require oral argument filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy [98-6113] (teb)
11/2/98	Corrected appellee proof brief filed by William Scott Sims, James F. Blumstein, G. Thomas Nebel. Copies: 1 Certificate of Service date 10/29/98 [98-6113] (teb)

Date	Proceedings
11/13/98	AMICUS BRIEF TENDERED. Received from Steven L. Craig for OH High School Ath, Edmund J. Sikorski for MI High School [98-6113]. Certificate of Service date 11/12/98 Corrections to be made; (yh)
11/16/98	PROOF REPLY BRIEF filed by Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 11/12/98 [98-6113] (teb)
11/17/98	MOTION filed to allow KY High School Athletic Assoc to become an amicus curiae. Motion filed by Danny C. Reeves for KY High School. Certificate of service date 11/16/98/. [98-6113]. (yh)
11/17/98	MOTION filed to allow MO State High School Assoc to become an amicus curiae. Motion filed by Mallory V. Mayse for MO High School. Certificate of service date 11/16/98. [98-6113] (yh)
11/18/98	AMICUS BRIEF TENDERED. Received from Danny C. Reeves for KY High School [98-6113]. Certificate of service date 11/16/98 Corrections to be made; (yh)

Date	Proceedings
11/18/98	AMICUS BRIEF TENDERED. Received from Mallory V. Mayse for MO High School [98-6113]. Certificate of service date 11/16/98 Corrections to be made; (yh)
11/23/98	APPENDIX filed by Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Copies: 5 (8 Volumes). Certificate of Service date 11/19/98 [98-6113] (ds)
11/27/98	Appellee RESPONSE opposition filed regarding a motion to allow amicus curiae to appear filed by Danny C. Reeves, Mallory V. Mayse, and John J. Kitchin. Response from H. Lee Barfield for Appellee Brentwood Academy, G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 11/24/98 [98-6113] (yh)
12/3/98	Appellant REPLY in response to the opposition to motion to file amicus briefs. Response from Richard L. Colbert for Appellant Ronnie Carter, Appellant TN Secondary School, Charles Hampton White for Appellant Ronnie Carter, Appellant TN Secondary School. Certificate of service date 12/2/98. [98-6113] (yh)

Date	Proceedings
12/7/98	Memorandum in support of motion by Missouri High School Activities Association to appear as amicus curiae filed by Mallory V. Mayse. Certificate of service date 12/3/98 [98-6113] (yh)
12/9/98	MOTION filed to allow Florida High school Activities Association to become an amicus curiae. Motion filed by Leonard E. Ireland for FL High School Assoc. Certificate of Service date 12/8/98. [98-6113] (yh)
12/9/98	AMICUS BRIEF TENDERED. Received from Leonard E. Ireland for Fl High School Assoc [98-6113]. Certificate of Service date 12/8/98 (yh)
12/10/98	MOTION filed to allow Illinois High School Assoc to become an amicus curiae. Motion filed by Terrence E. Kiwala for Il High School Assoc. Certificate of service date 12/9/98. [98-6113] (yh)
12/10/98	AMICUS BRIEF TENDERED. Received from Terrence E. Kiwala for IL High School Assoc [98-6113]. Certificate of service date 12/9/98 (yh)

Date	Proceedings
12/14/98	FINAL BRIEF filed by William Scott Sims, James F. Blumstein, H. Lee Barfield and G. Thomas Nebel for Appellee Brentwood Academy. Copies: 7. Certificate of service date 12/10/98. Number of Pages: 121. [98-6113] (teb)
12/14/98	FINAL BRIEF filed by Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Copies: 7. Certificate of Service date 12/10/98. Number of Pages: 58. [98-6113] (teb)
12/21/98	Appellee RESPONSE in opposition to the motion to allow Florida and Illinois High School Athletic Assoc, Kentucky, Michigan, Missouri and Ohio High School Athletic Associations to appear as amicus curiae. Response filed by H. Lee Barfield for appellee. [1855786-1]; Certificate of service date 12/17/98 [98-6113] (yh)
12/29/98	Appellant REPLY to appellees' opposition to the motions to allow amicus to appeal previously filed by Terrence E. Kiwala, et al. Response from Richard L. Colbert and Charles Hampton White for Appellants. Certificate of service date 12/28/98. [98-6113] (yh)

Date	Proceedings
4/15/99	ORDER filed granting motion to allow amicus curiae to appear [1855786-1] filed Terrence E. Kiwala Leonard E. Ireland Jr., Danny C. Reeves, Mallory V. Mayse and John J. Kitchin [98-6113] . (yh)
4/15/99	BRIEF filed by Steven L. Craig for Amicus Curiae OH High School Ath, Edmund J. Sikorski for Amicus Curiae MI High School. Copies 5. Certificate of service date 11/12/98. Number of Pages: . [98-6113] (yh)
4/15/99	BRIEF filed by Terrence E. Kiwala for Amicus Curiae Il High School Assoc. Copies 5. Certificate of Service date 9/12/98 [98-6113] (yh)
4/15/99	BRIEF filed by Mallory V. Mayse for Amicus Curiae MO High School. Copies 5. Certificate of service date 12/16/98 Number of Pages: . (yh)
4/15/99	BRIEF filed by Leonard E. Ireland for Amicus Curiae Fl High School Assoc. Copies 5. Certificate of service date 12/8/98 [98-6113] (yh)

Date	Proceedings
4/15/99	BRIEF filed by Danny C. Reeves for Amicus Curiae KY High School. Copies 5. Certificate of service date 11/16/98. [98-6113] (yh)
4/15/98	BRIEF filed by John J. Kitchin for Amicus Curiae Natl Fedn St High. Copies 5. Certificate of Service date: None. Number of Pages: . [98-6113] (yh)
4/23/99	CAUSE ARGUED on 4/23/99 by Charles Hampton White for Appellant Ronnie Carter, Appellant TN Secondary School, James F. Blumstein for Appellee Brentwood Academy before Judges Guy, Suhrheinrich, Gilman. [98-6113] (me)
4/30/99	Appellee MOTION filed to file supplemental brief. Motion filed by William Scott Sims, James F. Blumstein and H. Lee Barfield for Appellee Brentwood Academy. Certificate of Service date 4/29/99. [98-6113] (yh)

Date	Proceedings
5/6/99	Appellant RESPONSE opposition filed regarding a motion to file supplemental brief previously filed by William Scott Sims, James F. Blumstein, and H. Lee Barfield II. Response from Richard L. Colbert for Appellant Ronnie Carter, Appellant TN Secondary School, Charles Hampton for Appellant Ronnie Carter, Appellant TN Secondary School Certificate of service date 5/4/99. [98-6113] (yh)
5/18/99	RULING granting motion to file supplement brief [1937090-1] filed by William Scott Sims, James F. Blumstein, H. Lee Barfield II [98-6113]. (yh)
5/18/99	Supplemental brief filed by James F. Blumstein for Appellee Brentwood Academy, H. Lee Barfield for Appellee Brentwood Academy, G. Thomas Nebel for Appellee Brentwood Academy. Copies: 4. Certificate of service date 4/29/99. Number of Pages: 40 Includes exhibits [98-6113] (yh)

Date	Proceedings
6/21/99	OPINION filed: The district court's grant of summary judgment in favor of Brentwood is REVERSED: The injunction is VACATED and the case is remanded for further proceedings consistent with this opinion. Decision for publication pursuant to local rule 206 [98-6113]. Ralph B. Guy, Richard F. Suhrheinrich, Ronald L. Gilman, Authoring Judges. (yh)
6/21/99	JUDGMENT: VACATED, REVERSED and remanded. (yh)
7/6/99	PETITION for en banc rehearing filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 7/2/99. [98-6113] (blh)
7/21/99	LETTER SENT by blh to Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School notifying that party is directed to respond to a petition for en banc rehearing [1974689-1] filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel. Response due by 8/4/99. [98-6113]. (blh)

Date	Proceedings
7/23/99	MOTION filed to allow Chester E. Finn and Daniel Casse leave to file an amicus brief in support of appellee's petition for rehearing en banc. Motion filed by Daniel Casse for Daniel Casse, Chester E. Finn for Chester E. Finn. Certificate of service date 7/22/99. [98-6113] (blh)
7/23/99	TENDERED: brief of amicus curiae in support of appellee's petition for rehearing en banc from Daniel Casse for Daniel Casse and Chester E. Finn for Chester E. Finn [98-6113] (blh)
7/29/99	Appellant RESPONSE in opposition to motion of Chester E. Finn and Daniel Casse for leave to file an amicus brief in support of appellee's petition for rehearing en banc [1984674-1] filed by Daniel Casse and Chester E. Finn Jr. Response from Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 7/27/99. [98-6113] (blh)

Date	Proceedings
8/2/99	ORDER filed denying as untimely the motion for leave to file an amicus brief in support of appellee's petition for rehearing en banc [1984674-1] filed by Daniel Casse, Chester E. Finn Jr. pursuant to Rule 29(e), Federal Rules of Appellate Procedure. The amicus brief submitted by Finn and Casse is not accepted for filing. [98-6113]. Entered by order of the court. (blh)
8/4/99	RESPONSE to a petition for en banc rehearing [1974689-1] filed by William Scott Sims, James F. Blumstein, and G. Thomas Nebel. Response filed by Richard L. Colbert and Charles Hampton White for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 8/3/99. [98-6113] (blh)
8/6/99	ADDITIONAL CITATION in support of the petition for rehearing en banc filed by Wm. S. Sims for Appellee Brentwood Academy. Certificate of service date 8/5/99 [98-6113] (blh)
8/9/99	Appellant RESPONSE in opposition filed regarding the document filed 8/6/99 as an additional citation. Response from Richard L. Colbert for Appellants Ronnie Carter, TN Secondary School. Certificate of service date 8/6/99.

Date	Proceedings
8/12/99	Appellee MOTION filed to reconsider order dated 8/2/99 denying as untimely the motion filed by Daniel Casse and Chester E. Finn, Jr., for leave to file an amicus brief in support of appellee's petition for rehearing en banc. Motion filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel for Appellee Brentwood Academy. Certificate of service date 8/11/99. [98-6113] (blh)
8/18/99	ORDER filed denying motion to reconsider order of 8/2/99 denying as untimely the motion filed by Daniel Casse and Chester E. Finn, Jr. for leave to file an amicus brief in support of appellee's petition for rehearing en banc [1995718-1] filed by William Scott Sims, James F. Blumstein and G. Thomas Nebel [98-6113]. Entered by order of the court. (blh)
8/30/99	ORDER filed denying petition for en banc rehearing [1974689-1] filed by William Scott Sims, James F. Blumstein, and G. Thomas Nebel [98-6113]. Ralph B. Guy, Richard F. Suhrheinrich, Ronald L. Gilman, Circuit Judges. Judge Merritt separate statement on denial of en banc in which Judge Clay joined (blh)

Date	Proceedings
9/8/99	MANDATE ISSUED with no cost taxed [98-6113] (yh)
12/8/99	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed Appellee Brentwood Academy. Filed in the Supreme Court on 11-22-99, Supreme Ct. case number: [98-6113] (swh)
2/25/00	U.S. Supreme Court letter filed: Motion of Memphis University School, et al. for leave to file a brief as amicus curiae is granted; the motion of petition for summary reversal is denied; petition for writ of certiorari granted [2063033-1] filed by Brentwood Academy [98-6113]. Filed in the Supreme Court on 02-22-00. (swh)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**NO: 3-97- 249**
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	**JUDGE CAMPBELL**
	)	**MAG. JUDGE**
	)	**HAYNES**
	)	
	)	
Defendants.	)	

COMBINED STIPULATIONS

In accordance with Case Management Order No.1, Plaintiff Brentwood Academy and Defendants Tennessee Secondary Schools Athletic Association and Ronnie Carter submit these joint stipulations of fact designed to reduce discovery.

For purposes of this lawsuit and for no other purposes, the parties stipulate that the following facts are true:

I. Jurisdiction and Venue

1. This Court has personal jurisdiction over the parties and subject matter jurisdiction of the claims in this lawsuit.

2. Venue is proper in this Court.

II. Parties

A. Plaintiff Brentwood Academy

3. Plaintiff Brentwood Academy is a co-educational, independent, college-preparatory school founded in 1969, with its campus located at 219 Granny White Pike, Brentwood, Williamson County, Tennessee.

4. The school currently employs approximately 63 teachers and staff, and has an enrollment of 520 students in grades six through twelve.

5. The Headmaster is Bill Brown, the Athletic Director and Head Football Coach is Carlton Flatt and the Director of Admissions is Nancy Brasher. Mr. Brown has been Headmaster since the school's founding.

6. Brentwood Academy does not discriminate in its admission or employment policies. Its policies are:

> Brentwood Academy shall admit students of any race, color, and national or ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Academy. Brentwood Academy does not discriminate on the basis of race, creed, sex, national and ethnic origin in administration of the educational policies, admission policies, financial aid program, athletic, or other school administered programs.

7. The students at Brentwood Academy have been successful in interscholastic athletics. Despite having a much smaller enrollment than many of its competitors, Brentwood Academy has won a large number of league, district, regional and state athletic titles in a variety of sports.

8. Although Brentwood Academy has had success in many sports, its achievements in football have received the most public attention. The football team, under Head Coach and Athletic Director Carlton Flatt, has won nine football championships and finished second six times since 1974.

9. Brentwood Academy is a member of the TSSAA, and the school's interscholastic athletic teams regularly participate in athletic contests regulated by the TSSAA.

B. TSSAA and Carter

10. Defendant TSSAA is a non-profit corporation organized and existing under the laws of the State of Tennessee, with its principal place of business in Hermitage, Davidson County, Tennessee.

11. Defendant Ronnie Carter is the Executive Director of the TSSAA and, at all times relevant to this action involving Brentwood Academy, acted as an employee and agent of the TSSAA and within the scope of his authority as an employee and agent.

12. The TSSAA is a voluntary association of public, independent and parochial secondary schools from across the state of Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools compose 84% of the voting membership of the TSSAA with 290 public schools participating in the TSSAA out of a total of 345 schools. Independent and parochial schools compose 16% of the voting membership of the TSSAA (55 independent and parochial schools out of a total of 345 schools). The purpose of the TSSAA is to stimulate and regulate interscholastic athletic competition among its member schools.

13. The Constitution of the TSSAA in effect at all material times provides in Article I, Section 2:

> Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate [sic] the athletic and scholastic programs. The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

14. The rules and regulations of the TSSAA are enacted by the Legislative Council, a nine-member body composed of high school principals or assistant principals or qualified superintendents elected by popular vote in each of the nine electoral districts. The counties in each electoral district are set forth in Article II, Section 1 of the Constitution. Each member school has one vote.

15. All the voting members of the Legislative Council and the Board of Control in 1997 were public high school administrators. None of the voting members of the Legislative Council and the Board of Control in 1997 were principals of independent or parochial schools.

16. The State Board of Education for Tennessee does not actively supervise the development of rules and regulations by the TSSAA.

IV. Facts

* * * *

B. The February 10, 1993 Meeting

22. Representatives of Brentwood Academy initiated a meeting with Ronnie Carter, Executive Director of the TSSAA, in 1993 to answer questions about the application of the [Recruiting] Rule.

23. The meeting occurred on February 10, 1993 at Brentwood Academy. The meeting began at 2:00 p.m. and lasted from one to two hours.

24. The following persons attended the meeting: Ronnie Carter, Executive Director of the TSSAA, Bill Brown, Headmaster of Brentwood Academy, Hampton Pitts, a trustee of Brentwood Academy, Elizabeth Tate, Director of Admissions of Brentwood Academy, and Michael S. Peek, an attorney for Brentwood Academy.

25. The statements made by Ronnie Carter during this meeting were made in his capacity as an agent and employee of the TSSAA.

26. Michael S. Peek wrote a letter to Ronnie Carter dated February 24, 1993 about the meeting. A true and accurate copy of the letter is attached as Exhibit C.

27. Mr. Carter received the letter from Mr. Peek.

28. Mr. Carter did not respond in writing to Mr. Peek's letter.

29. Elizabeth Tate, the Director of Admissions, called Mr. Carter a few days after February 24, 1993 and Mr. Carter confirmed that he had received Mr. Peek's letter.

C. Change in Classification Regulations

30. In December of 1995, Brentwood Academy's football team defeated Murfreesboro Riverdale High School, a leading public school football power, in the Clinic Bowl to win the state football championship for the third time in six years.

31. As of March 3, 1998, Brentwood Academy's football team has a record of 310 wins, 43 losses and one tie under Head Coach Carlton Flatt.

32. In the spring of 1996, the Legislative Council of the TSSAA voted to change the basis for classification of schools for athletic purposes.

33. Prior to the decision of the Legislative Council to change the classification regulations for the TSSAA, schools were classified by size of enrollment. For example, schools playing football had been divided into five classes based on the total number of schools playing football. The schools were classed as follows:

5A -- Schools with enrollment of 1,341 and above
4A -- Schools with enrollment of 976 to 1,337
3A -- Schools with enrollment of 616 to 964
2A -- Schools with enrollment of 353 to 596
1A -- Schools with enrollment of 351 and under

34. The TSSAA also divided the schools for other sports into classes based upon enrollment. Three classes were established for basketball, baseball and softball -- Classes AAA, AA and A. Two classifications were

established in volleyball, golf, cross country, wrestling, boys soccer and track: Classes A-AA and Class AAA. In the classifications plans, the schools were classed as follows:

AAA -- Schools with enrollment of 1,014
AA -- Schools with enrollment of 414 to 999
A -- Schools with enrollment of 412

D. The Illegal Recruiting Controversy

35. Allegations that Glean Eddy, Jesse Kellogg, Jermonde Davis and Jacques Curry were recruited in violation of the Recruiting Rule were made in the first instance by certain public high school coaches.

36. These allegations of recruiting were subsequently communicated to Scott Brunette, the director of high school athletics for the Metropolitan Nashville Board of Education.

37. Brunette, in turn, communicated the allegations to the TSSAA.

38. Based on communications with Brunette, the TSSAA, through Defendant Carter, began an investigation into the allegations against Brentwood Academy. TSSAA Assistant Executive Directors Bernard Childress and Gene Menees interviewed Jacques Curry and Jesse Kellogg, two of the four students involved. Menees and Childress did not interview Jermonde Davis or Glean Eddy, the other two students. Menees and Childress talked with six public school coaches in the course of their investigation.

39. On July 29, 1997, Brentwood Academy was notified by Defendant Carter that the TSSAA had found Brentwood Academy guilty of multiple violations of the Recruiting Rule. This information was communicated to

Brentwood Academy in the July 29, 1997 letter from Defendant Carter attached as Exhibit D.

40. The TSSAA has stated that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls.

41. Defendant Carter's initial findings and penalties are accurately described in the July 29, 1997 letter from Defendant Carter to Brentwood Academy that is attached as Exhibit D.

42. Under TSSAA procedures, Brentwood Academy appealed to the full Board of Control at a hearing held on August 23, 1997, at the Music City Sheraton Hotel in Nashville. The members of the Board of Control who ruled on this second appeal were: Mike Reed of Morristown, President; Harry Durham of Memphis, Vice-President; Lynn Brown of Maryville; John Dixon of Benton; Morris Rogers of Huntland; Mike Hammond of Nashville; Mickey Dunn of Lawrenceburg; Fred Kessler of Bolivar; and Sam Myles of Dyersburg. Rogers, Hammond and Dunn had listened to the evidence in the first appeal.

43. The Board of Control's findings and penalties are accurately described in the August 23, 1997 letter from Mike Reed to Brentwood Academy attached as Exhibit E.

44. By electing to be a member of TSSAA, each member school agrees to abide by the Constitution and By-laws of TSSAA.

45. According to the TSSAA Constitution, the TSSAA By-laws are passed by a Legislative Council consisting of nine members elected by TSSAA member schools.

46. According to the TSSAA Constitution, the TSSAA By-laws are enforced by a Board of Control consisting of nine members elected by TSSAA member schools.

47. In 1990, a three-member committee of the Legislative Council was appointed to review the recruiting rule and propose additional questions and answers and guidelines for interpreting the rule in various situations. The committee included Jim Phifer, who was Vice President of the Legislative Council and principal of Notre Dame High School in Chattanooga, a non-public TSSAA member school. The result of this committee's work was the addition to the TSSAA handbook of new "questions and answers" pertaining to the recruiting rule.

48. In the 1992-93 TSSAA handbook, which was published and distributed prior to January 1, 1993, new "Guidelines for Understanding the 'Recruiting Rule' and Understanding 'What sUndue Influence?'" were added to the TSSAA handbook. The first of these guidelines provides:

> "The major theme of the 'recruiting rule' is not 'initial contact.' The major theme is 'exceeding what is normal and appropriate.' Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate."

49. Under TSSAA By-laws, Brentwood Academy was permitted to present an initial appeal on August 13, 1997, and a subsequent appeal to the entire Board of Control on August 23, 1997.

50. As a result of Brentwood Academy's appeals, the sanctions which Ronnie Carter imposed in his preliminary decision of July 29, 1997 were changed.

51. At the time of the meeting on February 10, 1993, and the letter of February 24, 1993, Brentwood Academy Headmaster Bill Brown and Athletic Director Carlton Flatt possessed or had ready access to a copy of the then-current TSSAA By-laws as set forth in the TSSAA Handbook.

52. At the time of the meeting on February 10, 1993, and the letter of February 24, 1993, the Guidelines for understanding the "recruiting rule" appeared in the TSSAA Handbook as a part of the TSSAA By-laws, and the first of those Guidelines stated:

> "The major theme of the 'recruiting rule' is not 'initial contact.' The major them is 'exceeding what is normal and appropriate.' Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate."

53. Carlton Flatt received a copy of Ronnie Carter's January 15, 1992 letter to Brentwood Academy Headmaster Bill Brown.

54. TSSAA's first version of the "recruiting rule" was adopted in 1935, and the rule in all its amended forms since 1935 has prohibited "the use of undue influence."

55. On or about May 30, 1997, Carlton Flatt informed TSSAA that John Patton coached Brentwood Academy's middle school boys basketball team and used the Brentwood Academy gym for an AAU basketball team that included several of Brentwood Academy's players.

56. Typically, Brentwood Academy has 8 to 12 new 9th-12th grade students participating in interscholastic football at the beginning of fall football practice.

57. In 1995, no students enrolled at other schools attended spring football practice at Brentwood Academy. In 1996, one or two students enrolled at other schools attended spring football practice at Brentwood Academy. In 1997, twelve students enrolled in the eighth grade at other schools attended varsity spring football practice at Brentwood Academy.

Respectfully submitted,

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[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
v.	)	**No. 3-97-1249**
	)	**Judge Campbell**
TENNESSEE	)	**Magistrate Judge Haynes**
SECONDARY SCHOOLS	)	
ATHLETIC ASSOCIATION	)	
and RONNIE CARTER,	)	
Executive Director and	)	
Individually,	)	
	)	
Defendants.	)	

DEFENDANTS' LOCAL RULE 8(b)(7)(c) RESPONSE

The defendants Tennessee Secondary School Athletic Association ["TSSAA"] and Ronnie Carter, Executive Director of TSSAA ["Carter"], submit this response under Local Rule 8(b)(7)(c) to the statement of undisputed material facts:

1. Plaintiff Brentwood Academy is a co-educational, independent, college-preparatory school founded in 1969. (Combined Stipulations, ¶3).

RESPONSE: This statement is undisputed.

2. The Headmaster Bill Brown, The Athletic Director and Head Football Coach is Carlton Flatt and the Director of Admissions is Nancy Brasher. (Combined Stipulations, ¶5)

RESPONSE: This statement is undisputed.

3. The guiding principle in Brentwood Academy's philosophy of secondary education is excellence in academics, athletics and spiritual life. (Complaint, ¶4; Answer, ¶4). The symbol of the school's philosophy is a triangle whose three sides represent spiritual, academic and athletic excellence. (Id.). The base of the triangle symbolizes spiritual growth, recognizing that the Academy's spiritual emphasis is the foundation of the academic and athletic achievements of its students. (Id.).

RESPONSE: These facts are immaterial, and therefore do not meet the requirements of Local Rule 8(b)(7)(b). The statement is undisputed for purposes of the motion for summary judgment.

4. Brentwood Academy is a member of the TSSAA. (Combined Stipulations, ¶9).

RESPONSE: This statement is undisputed.

5. The TSSAA is an association of public, independent and parochial secondary schools from across the state of Tennessee. (Combined Stipulations, ¶12). It is composed of 290 public schools and 55 independent and parochial schools. (Id.). Public high schools compose 84% of the voting membership of the TSSAA with 290 public schools participating in the TSSAA out of a total of 345 schools. (Id.). Independent and parochial schools compose 16% of the voting membership of the TSSAA (55 independent and parochial schools out of a total of 345 schools). (Id.). The purpose of the TSSAA is to stimulate and regulate interscholastic athletic competition among its member schools. (Id.).

RESPONSE: This statement is undisputed.

6. The rules and regulations of the TSSAA are enacted by the Legislative Counsel, a nine-member body composed of high school principals elected by popular vote of the TSSAA member schools in each of the nine electoral districts. (Complaint, ¶16; Answer, ¶16).

RESPONSE: This statement is undisputed.

7. The administrative authority of the TSSAA is vested in the Board of Control, a separate nine-member body comprised of high school principals elected by popular vote of the TSSAA member schools in each of the nine electoral districts. (Complaint, ¶17; Answer, ¶17).

RESPONSE: This statement is undisputed.

8. Defendant Ronnie Carter is the Executive Director of the TSSAA. (Combined Stipulations, ¶11).

RESPONSE: This statement is undisputed.

9. The Constitution of the TSSAA in effect at all material times provides in Article I, Section 2:

> Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate (sic) the athletic and scholastic programs. The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

(Combined Stipulations, ¶13).

RESPONSE: This statement is undisputed.

10. Article VI, Sections 1 and 2 of the TSSAA Constitution in effect at all material times provides:

> Any school charged with violating TSSAA regulations shall be notified of such charges by the Executive Director. If a hearing is desired by the school involved, the Executive Director must be notified immediately in writing. Provisions will then be made for such hearing, and the school so notified.
>
> A member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing. Hearings shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control who represent the Grand Division of the State in which the school is located, and who shall act in an advisory capacity. After testimony has been heard, the Executive Director shall meet in executive session with the members of the Board of Control who are present at the hearing. After discussing with the Board members the evidence and possible penalties, the Executive Director shall decide what penalty, if any, is to be placed against the school.

(Exhibit A, p. A-5).

RESPONSE: This statement is undisputed.

11. All the voting members of the Legislative Council and the Board of Control in 1997 were public high school administrators. (Combined Stipulations, ¶15). None

of the voting members of the Legislative Council and the Board of Control were principals of independent or parochial schools. (Id.).

RESPONSE: This statement is undisputed.

12. The membership of the TSSAA includes every public high school in Tennessee.

RESPONSE: This allegation does not meet the requirements of Local Rule 8(b)(7)(b) because it is not supported by a specific citation to the record, and therefore no response is required.

13. Article III of the TSSAA Constitution in effect at all material times provides:

> All members of the Board of Control must be principals or superintendents. (An assistant principal who devotes full time to administrative duties shall be eligible to serve.) County superintendents shall not be eligible for membership, nor shall city superintendents of systems of more than one four-year high school or senior high school be eligible for membership. A principal or superintendent cannot serve as a member of the Board of Control and as a member of the Legislative Council at the same time.

(Exhibit A, p. A-3).

RESPONSE: This statement is undisputed.

14. Article IV of the TSSAA Constitution in effect at all material times provides:

> All members of the Legislative Council must be principals or superintendents. (An assistant principal who devotes full time to administrative duties shall be eligible to serve.) County superintendents shall not be eligible for membership, nor shall city superintendents of systems of more than one four-year high school or senior high school be eligible for membership. A principal or superintendent cannot serve as a member of the Legislative Council and as a member of the Board of Control at the same time.

(Exhibit A, p. A-4)

RESPONSE: This statement is undisputed.

15. The TSSA.A was expressly found to be a "state actor" for purposes of 42 U.S.C. §1983 in Graham v. TSSAA. 1995 U.S. Dist. LEXIS 3211 (M.D.Tenn. Feb. 20, 1995).

RESPONSE: This allegation is immaterial and is not based on evidence in the record as required by Local Rule 8(b)(7)(b). It is undisputed that, on a record that was not fully developed regarding the "state actor" issue, the United States District Court for the Eastern District of Tennessee concluded for purposes of ruling in an application for injunctive relief that TSSAA was a state actor to whom 42 U.S.C. §1983 applied. Also, critical to the District Court's conclusion in Graham was the existence of Administrative Rule 0520-1-2-.08 of the state Board of Education. That rule had been substantially amended by the time of the events giving rise to this action.

16. The TSSAA was expressly found to be a "state actor" for purposes of 42 U.S.C. §1983 in Crocker v. ISSAA, 1995 U.S. App. LEXIS 877(6th Cir. Jan. 13, 1995).

RESPONSE: This allegation is both immaterial and disputed. In Crocker v. TSSAA, both in the District Court's decision on the merits and in the two subsequent appeals including the attorneys fee appeal cited in Item 16, the courts did not reach the issue of whether TSSAA was a "state actor" for purposes of 42 U.S.C. §1983.

17. The TSSAA was expressly found to be a "state actor" for purposes of 42 U.S.C. §1983 in Kelley v. Metropolitan County Board of Educ, 293 F. Supp. 485 (M.D. Tenn. 1968).

RESPONSE: This allegation is immaterial and is therefore not proper under Local Rule 8(b)(7)(b). In addition, the cited case was decided prior to 1982 when the Supreme Court of the United States adopted a new method of analysis of the "state action" issue in Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) and Rendell-Baker v. Kohn. 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), after which the Sixth Circuit adopted a two-part state action analysis not used in cases preceding Blum and Rendell-Baker. See Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986).

18. The TSSAA was implicitly found to be a "state actor" for purposes of 42 U.S.C. §1983 in Hamilton v. TSSAA, 552 F.2d 681 (6th Cir. 1976).

RESPONSE: TSSAA and Carter adopt and incorporate by reference their response to item 17 above. In addition, a Court need not implicitly find TSSAA to be a state actor in order to deny relief in an action under 42

U.S.C. §1983. See, e.g., Crocker v. TSSAA, 980 F.2d 382, 386 (6th Cir. 1992).

19. The TSSAA was implicitly found to be a "state actor" for purposes of 42 U.S.C. §1983 in 1977 in Cape v. TSSAA, 563 F.2d 793 (6th Cir. 1977).

RESPONSE: TSSAA and Carter adopt and incorporate by reference their response to item 17 above. In addition, a Court need not implicitly find TSSAA to be a state actor in order to deny relief in an action under 42 U.S.C. §1983. See, e.g., Crocker v. TSSAA 980 F.2d 382, 386 (6th Cir. 1992).

20. The TSSAA was implicitly found to be a "state actor" for purposes of 42 U.S.C. §1983 in Carnes v. TSSAA, 415 F. Supp. 569 (E.D. Tenn. 1976).

RESPONSE: TSSAA and Carter adopt and incorporate by reference their response to item 17 above. In addition, a Court need not implicitly find TSSAA to be a state actor in order to deny relief in an action under 42 U.S.C. §1983. See, e.g., Crocker v. TSSAA, 980 F.2d 382, 386 (6th Cir. 1992).

21. The employees of the TSSAA, including Defendant Carter, participate in the Tennessee Consolidated Retirement System. (Complaint, ¶20; Answer, ¶20).

RESPONSE: This statement is undisputed.

22. The public high school administrators who serve on the Board of Control and Legislative Council attend most TSSAA meetings during school time on school days when they are being paid out of public funds. [Exhibit M (Deposition of W. Michael Dunn, p. 80)]; [Exhibit N (Deposition of Lynn Brown, p. 43)].

RESPONSE: This statement does not meet the requirements of Local Rule 8(b)(7)(b), since it refers to meetings of both the Board of Control and the Legislative Council, and the citations to the record address only meetings of the Board of Control and not of the Legislative Council. Moreover, this statement is disputed. The Board of Control meeting in August is held on a Saturday. The Board of Control meetings in November and March are held on week days. The Board of Control meeting in June is held after school has been dismissed for the summer. Accordingly, half of the regularly scheduled Board of Control meetings are held on school days, and half of the meetings are held on non-school days. [Deposition of Ronnie Carter, p. 272]. The meeting of the Board of Control on August 23, 1997, at which the Board of Control rendered its final decision on the rule violations of Brentwood Academy, was held on a Saturday at a privately-owned facility, the Music City Sheraton.

23. The TSSAA derives approximately 5% of its revenues from membership fees paid by member schools. (Complaint ¶21; Answer ¶21).

RESPONSE: It is undisputed that TSSAA derives from 4% to 5% of its annual gross revenues from membership dues paid by member schools, including both public and independent schools.

24. A substantial portion of the TSSAA's annual revenue comes from the tournament receipts for the championship tournaments in football and basketball. (Complaint, ¶21; Answer, ¶21)

RESPONSE: This statement is undisputed.

25. Many of the athletic contests between and among member schools are played in state-owned facilities or on state-owned properties. (Complaint, ¶21; Answer, ¶21).

RESPONSE: This fact is undisputed. However, the member schools schedule their own regular-season athletic contests and set the sites for those contests without involvement of TSSAA. [Affidavit of Ronnie Carter]. In addition, TSSAA has no input into the selection of district and regional tournament sites. [Deposition of Ronnie Carter, p. 296]. At the state tournament level, where TSSAA does select the tournament sites, private facilities are used as well like Vanderbilt University for the Clinic Bowl. [Deposition of Ronnie Carter, p. 296]. In addition, where a public facility like Murphy Center is used for the state basketball tournament, TSSAA is required to execute a contract with the state in order to obtain the use of that facility. [Affidavit of Ronnie Carter].

26. In 1992, the State of Tennessee Board of Education promulgated administrative rule 0520-1-2-.08, attached as Exhibit B, recognizing and designating the TSSAA as the exclusive organization to supervise and regulate interscholastic athletic activities of public junior and senior high schools in Tennessee, and authorizing the State Board of Education to review and approve all TSSAA Bylaws.

RESPONSE: This allegation is disputed. The rule attached as Exhibit B was originally promulgated in 1972, and was thereafter amended at times until it was repealed in February 1996 and replaced by the current administrative rule in February 1996.

27. In 1996, the Tennessee Board of Education changed administrative rule 0520-l-2-.08 to read:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

A copy of the rule as amended in 1996 is attached as Exhibit C.

RESPONSE: This statement is undisputed.

28. A true and accurate copy of the Bylaws of the TSSAA (Revised 6/96) effective in 1997 at the time of the incidents in this lawsuit is attached as Exhibit D. (Combined Stipulations, ¶18).

RESPONSE: This statement is undisputed.

29. The Recruiting Rule is contained in Section 21 of the Bylaws of the TSSAA. It provides:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule.

(Combined Stipulations, ¶19).

RESPONSE: This statement is undisputed.

30. For guidance in interpreting the meaning of the Recruiting Rule, Section 21 of the Bylaws contains five questions and answers. (Combined Stipulations, ¶20). They are:

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

RESPONSE: This statement is undisputed.

31. For additional guidance in understanding the Recruiting Rule and the term "undue influence," Section 21 provides eight guidelines. (Combined Stipulations, ¶21). They are:

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12-, 13-, 14-year-old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

RESPONSE: This statement is undisputed.

32. The terms "feeder pattern" and "feeder school" are not defined in the Recruiting Rule. (See Exhibit D, Art.. II, §21).

RESPONSE: This statement is immaterial and undisputed.

33. According to TSSAA Bylaws, "[p]ublic high schools may contact public schools (elementary, middle school, junior high school) where there is a definite feeder pattern." (Exhibit D, Art. II, §21, Ques. 4).

RESPONSE: This statement is undisputed. However, it is misleading, since the same provision of the TSSAA By-Laws also provides that private or parochial schools may contact private elementary, middle, or junior high schools where there is a definite feeder pattern as well.

34. In the case of public high schools, those middle schools whose students are zoned to attend a particular high school are "feeder schools" for that high school.

RESPONSE: This statement is not supported by a citation to the record as required under Local Rule 8(b)(7)(b), and no response is therefore required.

35. All of a particular high school's feeder schools are said to be in that high school's "feeder pattern."

RESPONSE: This statement is not supported by a citation to the record as required under Local Rule 8(b)(7)(b), and no response is therefore required.

36. Many independent high schools are not considered to have any feeder schools other than their own seventh and eighth grade programs.

RESPONSE: This statement is not supported by a citation to the record as required under Local Rule 8(b)(7)(b), and no response is therefore required.

37. The TSSAA, through Defendant Carter, has stated that Brentwood Academy has no schools in its feeder pattern. [Exhibit 0 (Carter Depo., p. 41)].

RESPONSE: This statement is undisputed.

38. A high school is excepted from many of the strictures of the Recruiting Rule with respect to contacting students who attend middle schools in the high school's feeder pattern. (See, e.g., Exhibit 0, Carter Depo., p. 40-41).

RESPONSE: This statement is immaterial, and it is disputed. The recruiting rule makes specific provision with regard to contact by high schools, both public and independent, with students attending schools in the high schools feeder pattern, and those provisions of the recruiting rule speak for themselves.

39. Representatives of Brentwood Academy initiated a meeting with Defendant Carter in 1993 to answer questions about the application of the Recruiting Rule. (Combined Stipulations, ¶22).

RESPONSE: This statement is undisputed.

40. The meeting occurred on February 10, 1993 at Brentwood Academy. (Combined Stipulations, ¶23). The meeting began at 2:00 p.m. and lasted from one to two hours. (Id.).

RESPONSE: This statement is undisputed.

41. The following persons attended the meeting: Ronnie Carter, Executive Director of the TSSAA, Bill Brown, Headmaster of Brentwood Academy, Hampton Pins, a trustee of Brentwood Academy, Elizabeth Tate, Director of Admissions of Brentwood Academy, and Michael S. Peek, an attorney for Brentwood Academy. (Combined Stipulations, ¶24).

RESPONSE: This statement is undisputed.

42. The statements made by Ronnie Carter during this meeting were made in his capacity as an agent and employee of the TSSAA. (Combined Stipulations, ¶25).

RESPONSE: This statement is undisputed.

43. Michael S. Peek wrote a letter to Ronnie Carter dated February 24, 1993 about the meeting. (Combined Stipulations, ¶26); A true and accurate copy of the letter is attached as Exhibit E. (Id.).

RESPONSE: This statement is undisputed.

44. Carter received the letter from Mr. Peek. (Combined Stipulations, ¶27).

RESPONSE: This statement is undisputed.

45. Carter did not respond in writing to Mr. Peek's letter. (Combined Stipulations, ¶28).

RESPONSE: This statement is undisputed.

46. Elizabeth Tate, Brentwood Academy's Director of Admissions at the time, called Carter a few days after February 24, 1993 and Mr. Carter confirmed that he had received Mr. Peek's letter. (Combined Stipulations, ¶29).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

47. Allegations that Brentwood Academy recruited Glean Eddy, Jesse Kellogg, Jermonde Davis and Jacques Curry in violation of the Recruiting Rule were made in the first instance by certain public high school coaches. (Combined Stipulations, ¶35).

RESPONSE: This statement is undisputed.

48. These allegations of illegal recruiting were subsequently communicated to Scott Brunette, the director of high school athletics for the Metropolitan Nashville Board of Education. (Combined Stipulations, ¶36). Brunette, in turn, communicated the allegations to the TSSAA. (Id., ¶37).

RESPONSE: This statement is undisputed, although the term "illegal" is inappropriate because TSSAA rules do not have the force of law.

49. Based on communications with Brunette, the TSSAA, under the leadership of Defendant Carter, began an investigation into the allegations against Brentwood Academy. (Combined Stipulations, ¶38).

RESPONSE: This statement is undisputed.

50. TSSAA Assistant Executive Directors Bernard Childress and Gene Menees interviewed Jacques Curry and Jesse Kellogg, two of the four students involved. (Combined Stipulations, ¶38). Menees and Childress did not interview Jermonde Davis or Glean Eddy, the other two students. (Id.). Menees and Childress talked with six public school coaches in the course of their investigation. (Id.).

RESPONSE: This statement is undisputed.

51. The TSSAA did not take sworn statements from any of the public school coaches who accused Brentwood Academy of recruiting violations or any of the students interviewed during the course of the investigation.

RESPONSE: This statement is immaterial. In addition, it does not meet the requirements of Local Rule 8(b)(7)(b) since it is not supported by a citation to the record. Accordingly, no response is required.

52. Carter actively participated in the TSSAA's investigation of Brentwood Academy. (See Exhibit 0, Carter Depo., p.139-43).

RESPONSE: It is undisputed that Carter participated in the investigation to the extent described on pages 139-143 of his deposition. However, Carter did not personally interview students or coaches, and met only with Brentwood Academy personnel, relying upon the information supplied by Bernard Childress and Gene Menees with respect to the other aspects of the investigation. [Carter Deposition, pp. 141-42].

53. During the course of the TSSAA's investigation, Defendant Carter sent a letter dated July 3, 1997 to Brentwood Academy requesting information about potential violations of TSSAA Bylaws, including the Recruiting Rule.

RESPONSE: This statement is undisputed.

54. A true and accurate copy of the July 3, 1997 letter of inquiry from Defendant Carter to Brentwood Academy is attached as Exhibit F.

RESPONSE: This statement is undisputed.

55. A true and accurate copy of Brentwood Academy's letter dated July 15, 1997, which responded to the TSSAA's July 3, 1997 letter of inquiry, is attached as Exhibit G.

RESPONSE: This statement is undisputed.

56. Brentwood Academy answered fully all of the questions raised in the TSSAA's July 3, 1997 letter of

inquiry. (Affidavit of Carlton Flatt [hereinafter Flatt Aff.], ¶13).

RESPONSE: This statement is disputed. Bill Brown's letter of July 15, 1997, attached as Exhibit G to Brentwood Academy's statement of undisputed facts, shows on its face that Brown declined to answer fully all of the questions raised by Carter on July 3, 1997.

57. Brentwood Academy cooperated with the TSSAA in all respects during the investigation. (Flatt Aff., ¶14).

RESPONSE: This allegation is immaterial. For purposes of the motion for summary judgment only, it is undisputed.

58. On July 29, 1997, Brentwood Academy was notified by Defendant Carter that the TSSAA had found Brentwood Academy guilty of multiple violations of the Recruiting Rule. (Complaint, ¶60; Answer, ¶60).

RESPONSE: This allegation is undisputed, although it omits mention of violation of the rule pertaining to off season practice that was also found by Carter. [Exhibit H to Brentwood Academy Local Rule 8(b)(7)(b) Statement].

59. Defendant Carter's initial findings and penalties are accurately described in the July 29, 1997 letter from Defendant Carter to Brentwood Academy attached as Exhibit H. (Combined Stipulations, ¶41).

RESPONSE: This statement is undisputed.

60. Defendant Carter and the TSSAA have charged Brentwood Academy with a violation of the

Recruiting Rule by giving Jesse Kellogg, a prospective student, a free ticket ("the Free Ticket") to its football game against Lincoln County High School in the fall of 1996. (Complaint, ¶76; Answer, ¶76).

RESPONSE: This statement is disputed. The violation of the recruiting rule was a violation of the express provision prohibiting "admitting students to athletic contests free of charge where there is an admission being charged at the contest . . . ." [Article II, Section 21 of the TSSAA By-Laws, Question and Answer No. 4]. It is undisputed that the manner by which Jesse Kellogg was admitted without charge was by virtue of his receipt of a free ticket.

61. If Kellogg received the Free Ticket, it was given to him by Kevin Armstrong and not by anyone at Brentwood Academy. (Complaint, ¶80; Answer, ¶80; Flatt Aff., ¶11).

RESPONSE: This statement is immaterial, and it is disputed to the extent that Brentwood Academy seeks to absolve itself of responsibility for Kellogg's free admission to the game. Kevin Armstrong called Carlton Flatt on the Monday before the football game at Brentwood Academy against Lincoln County High School. [Kevin Armstrong Deposition, p. 80]. Armstrong talked to Flatt about Kellogg and Eddy, as well as other student athletes at Neelys Bend Middle School, and inquired about the requirements for admission to Brentwood Academy, in the same conversation in which he requested tickets to the game. [Armstrong Deposition, p. 81]. Without any discussion of who Armstrong intended to take to the game [Armstrong Deposition, p. 91], Flatt left three tickets in an envelope for Armstrong at the will-call window without any mechanism to insure

that the tickets were not used by student-athletes. [Armstrong Deposition pp. 99-100].

62. Kevin Armstrong is a teacher and coach at Neely's Bend Middle School. (Exhibit P, Armstrong Depo, p. 1, 10).

RESPONSE: This statement is undisputed.

63. Kevin Armstrong is not an alumnus, employee, booster or representative of Brentwood Academy, or otherwise affiliated or connected with the school. (Flatt Aff., ¶3).

RESPONSE: It is undisputed that Armstrong is not an alumnus, employee, or representative of Brentwood Academy. However, Armstrong has coached AAU basketball with Marcus Bodie both during and after the time when Bodie was a middle school basketball coach at Brentwood Academy, and the team they coached together in 1996 practiced on occasion at Brentwood Academy. [Armstrong Deposition, pp. 66-70]. Accordingly, Armstrong does have some connection with Brentwood Academy.

64. Kevin Armstrong has no contractual or other relationship with Brentwood Academy and no official or unofficial authority to act or make representations on behalf of Brentwood Academy. (Flatt Aff., ¶4).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

65. Brentwood Academy has never represented verbally or otherwise that Armstrong has authority to act or make representations on its behalf. (Flatt Aff., ¶5).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

66. Brentwood Academy has no control over the speech or the activities of Kevin Armstrong. (Flatt Aff., ¶6).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

67. During the week of the Brentwood Academy/Lincoln County High School football game in the fall of 1996, Armstrong telephoned Coach Flatt to request free tickets to the game. (Flatt Aff., ¶7)

RESPONSE: This statement is undisputed for purposes of the motion of summary judgment.

68. Coach Flatt agreed to provide the Free Tickets to Armstrong as a matter of professional courtesy, but only after carefully explaining that they could not be given to any student in the seventh grade or above. (Flatt Aff., ¶8).

RESPONSE: This statement is disputed. According to Armstrong, Flatt did not tell Armstrong not to give the free tickets to students, because if Flatt had told Armstrong that, Armstrong would not have done so. [Armstrong Deposition, p. 84].

69. Many public, independent and parochial schools in Tennessee have a long-standing tradition of giving free tickets to athletic events to professional colleagues who serve as teachers and coaches from other schools. (Flatt Aff., ¶9).

RESPONSE: This statement is disputed. Flatt's affidavit with regard to long-standing traditions of many public, independent and parochial schools in Tennessee is

not based on personal knowledge. While it is undisputed that some schools allow free admission to professional colleagues who serve as teachers and coaches from other schools, the means by which such free admission is allowed varies substantially from school to school and does not necessarily entail the provision of "free tickets."

70. Armstrong originally planned to give the Free Tickets to two adult guests, but his plans changed and he reportedly gave the Tickets to two of his students, Kellogg and Courtney Hale. (Exhibit P, Armstrong Depo., p.13).

RESPONSE: This statement is disputed. [Affidavits of Gene Foster and Maury McDonald].

71. Brentwood Academy officials had no knowledge of Armstrong's decision to take students to the game. (Flatt Aff., ¶10).

RESPONSE: This statement is disputed [Affidavits of Gene Foster and Maury McDonald]. Flatt's affidavit cited in support of this item cannot, based on his own personal knowledge, serve as an attestation to what other Brentwood Academy officials knew or did not know.

72. Brentwood Academy officials had no knowledge that any of the Free Tickets may have been given to Jesse Kellogg or any prospective student. (Flatt Aff., ¶12).

RESPONSE: See response to number 71.

73. Jesse Kellogg denies that he used a Free Ticket to enter the game. (See Exhibit I [Sworn Statement of Jesse Kellogg, p. 8, 19]).

RESPONSE: This fact is immaterial. The defendants do not dispute that Jesse Kellogg has made this denial, although Kevin Armstrong has, as previously discussed, stated that Jesse Kellogg did use a free ticket to enter the game.

74. Over the years, Brentwood Academy has allowed new incoming students, who have been accepted for admission and have committed to attend Brentwood Academy, to participate in many school activities at Brentwood Academy before they actually begin attending class at Brentwood Academy. (Flatt Aff., ¶15).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

75. It is not a violation of the Recruiting Rule for incoming students to participate in school activities at Brentwood Academy, including spring football practice, prior to the time that they actually begin school at Brentwood Academy. (See Exhibit 0, Carter Depo., p. 39).

RESPONSE: This statement is undisputed.

76. In 1995 or 1996, a new incoming female student, who had been accepted for admission and had committed to attend Brentwood Academy in the fall, requested permission to participate in cheerleading tryouts in April. (Flatt Aff., ¶16). The student was allowed to participate in tryouts and made the cheerleading squad. (Id.). Sometime thereafter, Brentwood Academy received a complaint from a parent to the effect that all new students should have been notified about cheerleading tryouts so that they could have participated if interested.

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

77. In the spring of 1997, the father of an incoming ninth-grade student named Ray Paul Marley ("Marley"), who had already been accepted for admission to Brentwood Academy and had committed to attend in the fall, requested permission for Marley to participate in Brentwood Academy's spring football practice. (Flatt Aff., ¶17).

RESPONSE: This statement is undisputed.

78. Marley's participation in spring practice was not a violation of the Recruiting Rule or any other TSSAA bylaw, even though he was attending the eighth grade at another school at the time. (See Exhibit 0, Carter Depo., p. 39).

RESPONSE: This statement is undisputed.

79. Coach Flatt and Brentwood Academy's Director of Admissions, Nancy Brasher, considered whether Brentwood Academy might be faced with a public perception problem similar to the cheerleading incident described in Paragraph 76 if Marley were allowed to participate in spring practice without notifying other new students. (Flatt Aff., ¶18).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

80. To avoid an incorrect public perception and to avoid singling anyone out for special attention, it was decided that Flatt would write a form letter for Brasher to send to all new incoming male students in grades nine and above informing them of the dates for spring practice and inviting them to participate if interested (the "Letter" or "Spring Practice Letter"). (Flatt Aff, ¶19).

RESPONSE: This statement is immaterial, and it is undisputed for purposes of the motion for summary judgment.

81. The Spring Practice Letter, a true and accurate copy of which is attached as Exhibit J, was mailed on or about April 23, 1997 to all new incoming male students who had signed contracts to attend Brentwood Academy. (Exhibit Q, Brasher Depo., p. 63).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

82. The full text of the Spring Practice Letter reads as follows:

> Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.
>
> Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:30 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.
>
> In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are

certainly glad that you decided to become an *Eagle*.

Your Coach,

/s/ Carlton Flatt

(Exhibit J).

RESPONSE: This statement is undisputed.

83. Prior to receiving the Spring Practice Letter, each of the students and their parents had already made initial contact with Brentwood Academy to express interest in attending, applied for admission, visited the campus, taken the admissions test, been accepted by Brentwood Academy, and entered into a contract to attend the school. (Flatt Aff., ¶20).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment. However, it is not properly supported by the affidavit of Carlton Flatt, since that affidavit includes statements not made on Flatt's own personal knowledge. According to Nancy Brasher, Brasher is the only person who would know if the students to whom the spring practice letter was sent had submitted enrollment contracts because those contracts come to her. [Brasher Deposition, p. 67].

84. Brentwood Academy requires all students, with the exception of those applying for financial aid, to pay a $300 deposit at the time they sign the contract to attend Brentwood Academy. (Flatt Aff., ¶21).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

85. After receiving the Spring Practice Letter, a parent telephoned Coach Flatt to ask whether it was important for his student to attend spring practice at Brentwood Academy if it conflicted with an activity in which the student was involved at his middle school. (Flatt Aff., ¶22).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

86. Although the Letter indicated that spring practice was optional, Coach Flatt believed, in light of the telephone call described in Paragraph 85, that all of the students who received the Letters should again be contacted and informed that they should not participate in spring practice if it conflicted with activities at their respective middle schools. (Flatt Aff., ¶23).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

87. Coach Flatt chose to telephone the students because there was not enough time before the start of spring practice to send another letter. (Flatt Aff., ¶24).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

88. The TSSAA and Defendant Carter have ruled that the Spring Practice Letters and telephone calls violated the Recruiting Rule. (Complaint, ¶65; Answer, ¶65).

RESPONSE: This statement is undisputed.

89. According to the TSSAA, the Spring Practice Letters and telephone calls violated the Recruiting Rule because they were directed to students who were not yet

"enrolled" at Brentwood Academy, as that term is used in the Recruiting Rule. (Exhibit 0, Carter Depo., p. 121).

RESPONSE: This statement is disputed. According to TSSAA, the fact that these students were not enrolled at Brentwood Academy as the term "enrolled" is defined under the TSSAA By-Laws was an element of the violation. However, the sum total of the violation occurred because the letters and telephone calls directed specifically at male students who were enrolled at and attending other schools, inviting them to attend spring practice at Brentwood Academy, exceeded what was normal and appropriate and therefore amounted to undue influence under the rule. [Carter Deposition, pp. 118-128].

90. According to the TSSAA, the term "enrolled", as used in the Recruiting Rule, means having completed three days of school or three days of a school activity such as fall football practice. (Exhibit 0, Carter Depo., p. 117-18).

RESPONSE: This statement is undisputed.

91. The TSSAA admits that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls. (Combined Stipulations, ¶40).

RESPONSE: This statement is undisputed.

92. Brentwood Academy appealed the imposition of sanctions in compliance with a two-step appellate procedure set forth in Article VI of the TSSAA Constitution. (Complaint, ¶82; Answer, ¶82). The first appeal was held on August 13, 1997 at the Municipal Building in Fayetteville, Tennessee before Defendant Carter and an advisory

committee comprised of three members of the Board of Control. (Id.).

RESPONSE: This statement is undisputed.

93. Defendant Carter was solely responsible for deciding the appeal. (Complaint, ¶83; Answer, ¶83).

RESPONSE: This statement is undisputed for purposes of the motion for summary judgment.

94. Although Carter was free to consult with the three board members who were present, he was not bound by their advice. (Complaint, ¶83; Answer, ¶83).

RESPONSE: This statement is undisputed.

95. Brentwood Academy was not given an opportunity at the August 13, 1997 hearing to cross-examine witnesses who made allegations against the school. (Complaint, ¶85; Answer, ¶85).

RESPONSE: This statement is disputed. Although it is undisputed that Brentwood Academy was not given an opportunity on August 13, 1997, to cross-examine Ronnie Carter, Bernard Childress, or Gene Menees, all TSSAA employees, Brentwood Academy was free to bring in any other persons to make statements, present information, or answer questions as a part of Brentwood Academy's presentation.

96. The results of this first appeal are accurately set forth in the August 14, 1997 letter from Defendant Carter to Brentwood Academy attached as Exhibit K. (Complaint, ¶86; Answer, ¶86).

RESPONSE: This statement is undisputed.

97. Under TSSAA procedures, Brentwood Academy appealed to the full Board of Control at a hearing held on August 23, 1997, at the Music City Sheraton Hotel in Nashville. (Combined Stipulations, ¶42).

RESPONSE: This statement is undisputed.

98. Brentwood Academy was not given an opportunity at the August 23, 1997 hearing to cross-examine witnesses who made allegations against the school.

RESPONSE: This statement is not supported by a citation to the record as required under Local Rule 8(b)(7)(b), and therefore no response is required.

99. All of the voting board members who participated in the Brentwood Academy hearings are principals of public high schools; none are principals at independent or parochial schools. (See Combined Stipulations, ¶15).

RESPONSE: This statement is undisputed and immaterial.

100. The Board of Control's findings and penalties are accurately described in the August 23, 1997 letter from Mike Reed to Brentwood Academy attached as Exhibit L. (Combined Stipulations, ¶43).

RESPONSE: This statement is undisputed.

101. Defendant Carter was present during the Board of Control's deliberation process. (Exhibit 0, Carter Depo., p. 15).

RESPONSE: This statement is undisputed and immaterial.

102. Defendant Carter answered questions from members of the Board of Control during the deliberation process. (Exhibit 0, Carter Depo., p. 15-16).

RESPONSE: This statement is undisputed and immaterial.

103. The Board of Control imposed the following penalties on Brentwood Academy:

1. The entire athletic program of Brentwood Academy was put on probation for four years.

2. Brentwood Academy's football and boy's basketball programs were suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy was fined $3,000.

4. Brentwood Academy's football and boys' basketball programs were not permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy were to meet with the TSSAA Executive Director to develop an administrative control plan to help guard against future problems.

(Complaint, ¶89; Answer, ¶89).

RESPONSE: This statement is undisputed.

/s/ Charles Hampton White
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[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	
	)	**NO: 3-97- 249**
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	**JUDGE CAMPBELL**
	)	**MAG. JUDGE**
	)	**HAYNES**
	)	
	)	
	)	
Defendants.	)	

PLAINTIFF BRENTWOOD ACADEMY'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 8(b)(7)(d), plaintiff Brentwood Academy submits the following responses to defendants' Statement of Undisputed Facts:

1. TSSAA is a non-profit corporation with its principal place of business in Hermitage, Tennessee. [Combined Stipulations No. 10].

RESPONSE: Undisputed.

2. TSSAA is a voluntary association of public, independent, and parochial secondary schools from across the state of Tennessee. The purpose of TSSAA is to stimulate and regulate interscholastic athletic competition

among its member schools. [Combined Stipulations No. 12].

RESPONSE: Undisputed, except the use of the term "voluntary" in this context is disputed. While the TSSAA purports to be a voluntary association, Brentwood Academy disputes that the TSSAA is in fact a voluntary association as that term is interpreted in the law of voluntary associations. [See Brentwood Academy's Memorandum in Opposition to Summary Judgment on State Claims].

3. Brentwood Academy renews its membership with TSSAA annually. [Bill Brown Depo. at 157].

RESPONSE: Undisputed.

4. Brentwood Academy voluntarily chooses to join TSSAA each year and is under no compulsion to do so. [Bill Brown Depo. at 158].

RESPONSE: Disputed. While Brentwood Academy has chosen to join the TSSAA in the past, Brentwood Academy disputes that it is under "no compulsion" to do so. Although the TSSAA purports to be a "voluntary" association, high schools in Tennessee must, as a practical matter, belong to the TSSAA for a number of reasons, including the need to schedule games, to compete for state championships, to help attract and motivate students to want the best extracurricular programs and to generate revenues for the athletic department to help in balancing the budget. [Second Carlton Flatt Aff., ¶4; Ellis H. Haguewood Aff., ¶5].

5. Each year when Brentwood Academy elects to join TSSAA, an official executes on behalf of the school a membership application in which Brentwood Academy

agrees that it will conduct its athletic program for that year in accordance with the rules and decisions of TSSAA. [Bill Brown Depo. at 158-89, Collective Exhibit 19].

RESPONSE: Undisputed.

6. On August 12, 1997, one day before the hearing in Fayetteville and eleven days before the final decision of the Board of Control, Brentwood Academy Headmaster Bill Brown signed a membership application on behalf of Brentwood Academy in which he agreed that Brentwood Academy would comply with the decisions of TSSAA and with the provision of the TSSAA Constitution which declares that the Board of Control acts as the final Court of Appeals on matters involving application and interpretation of TSSAA By-Laws. [Bill Brown Depo. at 159-60].

RESPONSE: Undisputed.

7. After the decision of the Board of Control on August 23, 1997, Bill Brown met with administrators of other independent schools throughout the state and learned that there was perception among other independent schools, and not just among public schools, that Brentwood Academy's main focus was on football. [Bill Brown Depo. at 163-64].

RESPONSE: This statement is undisputed but misleading. The referenced perception was espoused by only "some" independent schools. [Bill Brown Depo. at 164]. Other schools expressed very positive views about Brentwood Academy. [Id.].

8. Prior to the August 23 decision of the TSSAA Board of Control, Brentwood Academy or persons

acting on behalf of Brentwood Academy, including Brentwood Academy Director of External Affairs Mark McFerran, supplied information to a public relations agency and to Jim Wyatt of *The Tennessean* pertaining to the investigation and proceedings involving the Brentwood Academy violations of TSSAA rules that were at issue at the August 23 hearing. [Bill Brown Depo. at 155-157].

RESPONSE: Undisputed.

9. Brentwood Academy has no evidence that Ronnie Carter was biased against Brentwood Academy or acted in bad faith or with improper motives when he decided to impose sanctions on Brentwood Academy. [Bill Brown Depo. at 151-153].

RESPONSE: This statement is disputed. Although Mr. Brown had no direct admissions or knowledge of bias, bad faith or improper motivation by Carter, there is a wealth of evidence showing that is was in Carter's self-interest as Executive Director to "throw the book" at Brentwood Academy regardless of the existence of solid evidence of recruiting violations. [See Brentwood Academy's Memorandum in Opposition to Summary Judgment on State Claims].

10. Brentwood Academy has no evidence that the Board of Control was biased against Brentwood Academy or acted in bad faith or improper motives in rendering its decision on August 23, 1997. [Bill Brown Depo. at 151-153].

RESPONSE: This statement is disputed. [See Brentwood Academy's Memorandum in Opposition to Summary Judgment on State Claims].

11. Ronnie Carter provided notice of the charges to Brentwood Academy, and Brentwood Academy knew what the charges against it were when it presented information at hearings on August 13 and August 23, 1997. [Bill Brown Depo. at 147].

RESPONSE: This statement is disputed. Notwithstanding defendants' misleading citation to a few out-of-context comments from Bill Brown's deposition, Brentwood Academy was not provided clear notice of all the charges against it at any point during the proceedings before the TSSAA. [Bill Brown Depo. at 173; Carlton Flatt Depo. at 79]. For example, the TSSAA sanctioned Brentwood Academy for "contact with student-athletes, initiated by Brentwood Academy" in its final letter decision of August 27,1997, but did not specify the individuals or contacts. [Ronnie Carter Depo., Exhibit 4]. Early on, the TSSAA indicated a concern over alleged recruiting activities by Bart King. [Id., Exhibit 11]. The TSSAA now claims that King played no part in its decision to sanction Brentwood Academy. [Complaint, ¶ 70; Answer, ¶ 70].

12. When Bill Brown received the written notification of the Board of Control's August 23, 1997, decision, he understood the first referenced violation to involve the occurrence where Kevin Armstrong provided a Brentwood Academy football game ticket to Jesse Kellogg, the second referenced violation to involve the letters and phone calls from Carlton Flatt regarding spring practice, and the third referenced violation to involve John Patton's practices with an AAU team included five of Brentwood Academy's players. [Bill Brown Depo. at 125-26].

RESPONSE: This statement is disputed. [See Response to Statement No. 11].

13. Other than loss of the $300.00 enrollment fee if paid, there is no penalty or amount due from a student who has signed an enrollment contract to attend Brentwood Academy if that student elects not to attend Brentwood Academy prior to actually entering school at the beginning of the school year. [Bill Brown Depo. at 105-106].

RESPONSE: This statement is disputed. Nancy Brasher, Brentwood Academy's Director of Admissions, is the person most knowledgeable about and primarily responsible for dealing with enrollment contracts at Brentwood Academy. [Nancy Brasher Aff., ¶ 3]. According to Ms. Brasher, a student who signs an enrollment contract and later elects not to attend Brentwood Academy is liable for the entire tuition for that school year. [Nancy Brasher Depo. at 88-90; Nancy Brasher Aff., ¶ 4]. This obligation arises immediately after the contract is signed. [Nancy Brasher Aff., ¶ 4].

14. Although an enrollment contract for 1997-98 at Brentwood Academy was signed for Jacques Curry, Jacques Curry incurred no penalty when he did not in fact enroll at Brentwood Academy in August of 1997. [Bill Brown Depo. at 105-106, Exhibit 11].

RESPONSE: Brentwood Academy does not dispute that Jacques Curry did not incur any penalty when he did not enroll in Brentwood Academy in August of 1997. Although his family would be liable for the entire amount of tuition for the 1997-98 school year, Brentwood Academy chose not pursue any remedy that it might have against Jacques Curry or his family because the school suffered no financial loss. [Nancy Brasher Aff., ¶ 5].

15. Brentwood Academy has no information that TSSAA and public school officials have acted in concert

with one another to develop a plan to retaliate against Brentwood Academy and other independent and parochial schools. [Bill Brown Depo. at 76-77].

RESPONSE: This statement is disputed. It is undisputed that a group of public school officials lead by Hulon Watson, then the principal at Murfreesboro Riverdale High School, instituted a secret movement of public school to exclude independent schools from competition against public schools within the TSSAA. [Hulon Watson Depo. at 13, 16, 55-56]. This concerted action was primarily in response to the athletic success of independent schools in general and Brentwood Academy in particular [id. at 55-56, 77-78, 102], and lead to the creation of a separate competitive division within the TSSAA, called Division II, for all schools offering financial aid to needy students. [Id. at 109-110, 122-24, 129-30]. Mr. Carter and the TSSAA staff were not informed of the secret plans because they had opposed efforts to move the independent schools to a separate division several years before.

16. Brentwood Academy Headmaster Bill Brown has never sought election to either the TSSAA Legislative Council or the TSSAA Board of Control. [Bill Brown Depo. at 71].

RESPONSE: Undisputed.

17. Brentwood Academy Headmaster Bill Brown does not know which member of the Legislative Council and which member of the Board of Control are the elected representatives for the district in which Brentwood Academy is located. [Bill Brown Depo. at 72-73].

RESPONSE: It is undisputed that Mr. Brown did not know the representative's name on the day of the deposition.

18. Since before the events giving rise to this action, Brentwood Academy Headmaster Bill Brown has actively encouraged other independent schools to join Brentwood Academy and withdraw from the TSSAA. [Bill Brown Depo. at 61-63].

RESPONSE: This statement is disputed. As to the meaning of "actively encouraged," Mr. Brown has expressed the opinion that independent schools should withdraw from the TSSAA and form another athletic association because the TSSAA is unresponsive to the needs of independent schools. [Brown Depo. at 61-63].

19. Brentwood Academy admits that nothing in Mike Peek's February 24, 1993, letter says that once initial contact is made with a school, coaches can provide information on the school's athletic program to the student and his or her family in a meeting or conversation or a letter away from the campus. [Bill Brown Depo. at 37-38, Exhibit 4].

RESPONSE: This is disputed to the extent that a normal reading of this letter would imply that if a representative of the school can communicate information to a prospective student or his family on campus after initial contact by the interested student, then a representative of the school (including a coach) could respond to an inquiry by phone or letter. [Michael Peek Depo. at 17-18].

20. Brentwood Academy admits nothing in Mike Peek's February 24, 1993, letter addresses the sending of letters and making of phone calls to prospective male

students to invite them to spring practice. [Bill Brown Depo. at 39-41, Exhibit 4].

RESPONSE: Disputed. [See Response to Statement No. 19].

21. Brentwood Academy admits that nothing in Mike Peek's February 24, 1993 letter addresses leaving tickets for free admission to a football game in a manner that allows the use of such a ticket by a prospective student who is attending the eighth grade at another school. [Bill Brown Depo. at 41, Exhibit 4].

RESPONSE: Undisputed.

22. Brentwood Academy admits that nothing in Mike Peek's February 24, 1993 letter addresses the limitations in the TSSAA By-Laws on off-season practices for basketball. [Bill Brown Depo. at 43, Exhibit 4].

RESPONSE: Undisputed

23. Mike Peek's February 24, 1993, letter is a fairly complete recount of what was discussed at the February 10, 1993 meeting between Ronnie Carter and Brentwood Academy officials, and there were no major items discussed at that meeting other than the items mentioned in the eight numbered paragraphs of Mike Peek's February 24, 1993 letter. [Bill Brown Depo. at 31-34].

RESPONSE: The first clause of this statement is disputed in so much as the phrase "fairly complete recount" is vague and ambiguous. It is undisputed that Peek's letter covers all of what Brentwood Academy considered to "major items" at the time of the meeting, which took place more than three years prior to the present controversy.

Some of the details of that meeting, however, are not included in Peek's letter. [See Second Liz Tate Aff., ¶ 4].

24. TSSAA was formed in 1925. [Ronnie Carter Depo. at 291].

RESPONSE: Undisputed

25. From the time TSSAA was formed in 1925 until the State Board of Education adopted Administrative Rule 0520-1-2-.08 in 1973, no agency of state government exercised any control over TSSAA's activities. [Ronnie Carter Depo. at 291].

RESPONSE: This statement is disputed. It is merely an allegation, not a statement of fact. Although Carter self-servingly testified that he was not aware of any state agency having control over the TSSAA prior to 1973, [Ronnie Carter Depo. At 291], he has absolutely no personal knowledge of and is not competent to testify about the relationship between the TSSAA and the State of Tennessee at any time prior to 1978, the year that Carter left Overton High School to become an Assistant Executive Director of the TSSAA. [Id. at 8].

26. Neither the statute which sets forth the powers and duties of the Commissioner of Education nor the statute setting forth the powers and duties of the State Board of Education authorizes the Commissioner of Education or the State Board of Education to regulate the conduct of TSSAA. [Tenn. Code Ann. §§49-1-201 and 49-1-302].

RESPONSE: This statement is disputed. The State Board of Education is given the implicit authority to regulate the activities of the TSSAA under T.C.A. §49-1-302. By way of illustration, Administrative Rule 0520-1-2-

.08, which formerly required the State Board of Education to annually approve the rules and regulations of the TSSAA, expressly relied upon T.C.A. §49-1-302 as its statutory authority. Although Jerome V. Sailor takes the contrary position with respect to T.C.A. §49-1-302 in his affidavit and contends that the passage of the former version of Administrative Rule 0520-1-2.08 was an ultra vires act, his opinion has no evidentiary impact on these legal issues.

27. The promulgation of Administrative Rule 0520-1-2-.08 by the State Board of Education in 1972 did not result in the exertion of any control over the activities of TSSAA by the State Board of Education. [Ronnie Carter Depo. at 291].

RESPONSE: This statement is disputed. Pursuant to Administrative Rule 0520-1-2-.08, the State Board of Education reviewed and unanimously approved all of the rules and regulations of the TSSAA on at least four occasions -- 1972. 1988, 1991 and 1992. [See Gary Nixon Aff. (State Board of Education Minutes from March 27, 1992 Meeting); (State Board of Education Minutes from May 31, 1991 Meeting); (State Board of Education Minutes from May 27, 1988 Meeting); (State Board of Education Minutes from August 25, 1972 Meeting)].

Another example of the Board of Education's exercise of its right to control the TSSAA is the Board's dissatisfaction with minority hiring at the TSSAA. The Board's minutes reflect that it scrutinized the TSSAA's minority hiring practices at meetings on July 29, 1994 and September 29, 1994, and ultimately extracted a promise from the TSSAA to improve in this area in the following year or two as funds became available. [See Gary Nixon Aff. (State Board of Education Minutes from July 29, 1994

Meeting); (State Board of Education Minutes from September 29, 1994 Meeting)].

28. The General Assembly of the State of Tennessee does not appropriate any funds to TSSAA. [Ronnie Carter Depo. at 292].

RESPONSE: Undisputed.

29. Neither the State Board of Education nor any other agency of the state has authority to approve or disapprove the contracts of TSSAA. [Ronnie Carter Depo. at 292].

RESPONSE: This statement is disputed. Regardless of whether the State Board of Education chooses to approve or disapprove of the contracts of the TSSAA, it has authority to do so pursuant to T.C.A. §49-1-302. [See Response to Statement No. 26].

30. TSSAA is not required to make any reports to the State Board of Education or to any other agency of the State of Tennessee. [Ronnie Carter Depo. at 292].

RESPONSE: This statement is disputed. The State Board of Education directed Ronnie Carter to report to it on the TSSAA's minority hiring practices at the Board's July 29, 1994 meeting, and again at the Board's September 29, 1994 meeting. [See Response to Statement No. 27]. Moreover, it appears that as late as 1993, the State Board required annual reports from the TSSAA regarding its activities and issues involving high school athletics. [See, e.g., Gary Nixon Aff. (State Board of Education Memorandum from May 12, 1993); (Poulton Memorandum of March 13, 1992); (Poulton Memorandum of March 12, 1989)].

31. The "guidelines for understanding the recruiting rule" that appear with the recruiting rule in the TSSAA By-Laws were developed by a committee that included Jim Phifer, who was at the time Vice President of the Legislative Council and principal of Notre Dame High School, an independent school in Chattanooga. [Ronnie Carter Depo. at 294].

RESPONSE: Undisputed.

32. The information that Brentwood Academy Middle School basketball coach John Patton coached an AAU basketball team that included several Brentwood Academy players, information which formed the basis for the finding that Brentwood Academy violated the TSSAA rule on off-season practice, was supplied by Brentwood Academy Athletic Director Carlton Flatt in a memo received by TSSAA on May 30, 1997. [Bill Brown Depo., Exhibit 15].

RESPONSE: It is disputed as to what actually "formed the basis for the finding that Brentwood Academy violated the TSSAA rule on off-season practice", because that rule is not written, nor has it been previously interpreted, as it has been enforced against Brentwood Academy. [Carlton Flatt Depo. at 59-60; Rick Insell Aff.].

33. In a memo to Ronnie Carter received by TSSAA on June 13, 1997, Brentwood Academy Headmaster Bill Brown supplied the information which reflected that the AAU basketball team coached by John Patton and mentioned in Carlton Flatt's earlier memorandum exceeded the permissible number of practices under the off-season practice rule. [Bill Brown Depo., Exhibit 17].

RESPONSE: This statement is disputed. Bill Brown supplied information to the TSSAA about the AAU team coached by John Patton, but that team is not subject to the TSSAA's off-season practice rule. [See Brentwood Academy's Memorandum in Opposition to Summary Judgment on State Claims].

34. In a letter to Ronnie Carter received by TSSAA on June 13, 1997, Brentwood Academy Headmaster Bill Brown informed Ronnie Carter of letters written to new incoming male students informing them of spring practice, which formed a part of the violation of the recruiting rule by Brentwood Academy. [Bill Brown Depo., Exhibit 17].

RESPONSE: It is disputed that these letters violated the Recruiting Rule. [See Brentwood Academy's Memorandum in Opposition to Summary Judgment on State Claims].

35. In a letter dated July 15, 1997, Brentwood Academy Headmaster Bill Brown supplied information regarding Carlton Flatt's letter to incoming male students who were enrolled at other schools, to advise them about spring practice, and Carlton Flatt's telephone calls to the parents of those students pertaining to spring football practice, information which formed the basis of a finding by TSSAA that Brentwood Academy violated the recruiting rule. [Bill Brown Depo., Exhibit 18].

RESPONSE: It is disputed that either the letters or the calls violated the Recruiting Rule. [See Brentwood Academy's Memorandum in Opposition to Summary Judgment on State Claims].

36. According to Kevin Armstrong, Jesse Kellogg was admitted free to an interscholastic football

game between Brentwood Academy and Lincoln County High School played at Brentwood Academy in the fall of 1996. [Kevin Armstrong Depo. at 11, 16-17].

RESPONSE: This statement is undisputed, but somewhat misleading. The free ticket allegation by the TSSAA is that Kellogg entered the game with a ticket given to him by Armstrong, not Brentwood Academy. [Kevin Armstrong Depo. at 16]. Although Armstrong received the free ticket from Coach Flatt, Coach Flatt did not intend for the ticket to be given to a student and that no one a Brentwood Academy knew that Armstrong had, in fact, given Kellogg or any other student a free ticket. [First Carlton Flatt Aff. ¶¶ 10, 12].

37. As of the time of the events giving rise to this action, State Board of Education Administrative Rule 0520-1-2-.08 did not provide for State Board of Education review or approval of TSSAA's By-Laws, did not provide for any delegation of authority by the State Board of Education to TSSAA, and did not require any schools to maintain membership in TSSAA. [State Board of Education Administrative Rule 0520-1-2-.08 (February 28, 1996)].

RESPONSE: Disputed. One of the events giving rise to this action was the passage of the Recruiting Rule and its subparts, which were in fact approved by the State Board of Education. [See Response to Statement No. 38].

38. The State Board of Education does not in any way approve or disapprove or act upon any of the TSSAA rules and regulations regarding the regulation of athletic competition between member schools. [Affidavit of Jerome V. Sailors].

RESPONSE: This statement is disputed and misleading. In at least 1972, 1988 and 1991, the State Board of Education unanimously approved all of the rules and regulations of the TSSAA. [See Response to Statement No. 27]. In 1992, the Board again approved all of the rules and regulations of the TSSAA, including the Recruiting Rule in virtually the same form in which it existed at the time of the conduct underlying the alleged recruiting violations by Brentwood Academy in this case. [See id.]. In fact, Brent Poulton, the Executive Director of the State Board of Education at the time, declared in a May 13, 1992 memorandum to the other Board members that the Board's annual review and approval of the TSSAA's rules and regulations was **"important as a means of reminding the world that the TSSAA works as an agent on behalf of the State Board of Education."** [Gary Nixon Aff. (Poulton Memorandum of May 13, 1992)]. Further, although the State Board of Education may not choose to do so presently, it has the authority to approve, disapprove or act upon any of the rules and regulations of the TSSAA by virtue of the powers granted to it under T.C.A. §49-1-302. [See Response to Statement No. 26].

39. TSSAA does not submit to the State Board of Education for approval its rules and regulations, nor does the State Board of Education approve, consider, or disapprove the salaries for the Executive Director, the Associate Executive Directors, or the staff members of the TSSAA. [Affidavit of Jerome V. Sailors].

RESPONSE: This statement is disputed. Regardless of whether the TSSAA currently requests approval of its rules and regulations by the Board of Education or not, the Board of Education reviewed and approved the TSSAA's rules and regulations in at least 1972, 1988, 1991 and 1992, and has the power to do so presently, whether it chose to or

not. [See Response to Statement Nos. 26, 27]. In fact, the very rules Brentwood Academy is charged with violating were approved by the State Board of Education when they were submitted by TSSAA in 1992. [Ronnie Carter Aff. (History of Recruiting Rule)]. This authority implicitly extends to salary issues pertaining to TSSAA employees also. [T.C.A. §49-1-302].

40. TSSAA has the authority to purchase real property, buy and sell property, mortgage or encumber property and execute promissory notes, deeds of trust, or mortgages without any approval or consideration by the State Board of Education. [Affidavit of Jerome V. Sailors].

RESPONSE: This statement is disputed. The TSSAA cannot engage in any activity without, at a minimum, the tacit approval of the Board of Education since the Board has the power to regulate the conduct of the TSSAA pursuant to T.C.A. §49-1-302. [See Response to Statement Nos. 26, 27]

41. TSSAA does not submit to nor does the State Board of Education approve any budget of any type for TSSAA's operations. [Affidavit of Jerome V. Sailors].

RESPONSE: Undisputed.

42. TSSAA does not receive any tax revenues from the State of Tennessee, the State Board of Education, or the Department of Education. [Affidavit of Jerome V. Sailors].

RESPONSE: This statement is disputed. The TSSAA receives public funds indirectly from membership dues paid by a substantial portion of its public school membership.

43. No member of the State Board of Education attends meetings either of the TSSAA Board of Control or the TSSAA Legislative Council. [Affidavit of Jerome V. Sailors].

RESPONSE: This statement is disputed. The term "member" is not defined If it includes the members of the State Board of Education professional staff and the members of the Board, Dr. Sailors' testimony in his affidavit on this issue is incorrect. The State Board of Education has had ex officio members on both the TSSAA Legislative Council and Board of Control since 1972. [See Gary Nixon Aff. (State Board of Education Minutes from August 25, 1972 Meeting)]. The members of the current Board of Education staff who sit in an ex officio capacity on the TSSAA Board of Control and Legislative Council are J.V. Sailors and Gary Nixon. [See Exhibit A (Excerpt from TSSAA Website printed July 15, 1998)]. Since 1990, State Board of Education members or their representatives have attended at least eighteen Board of Control meetings, with the last being as recently as June 11, 1997 [see Exhibit B (Collection of TSSAA Board of Control Minutes)], and seven Legislative Council meetings. [See Exhibit C (Collection of TSSAA Legislative Council Minutes)]. Dr. Sailors himself attended a two-day Board of Control meeting at Fall Creek Falls State Park just last year. [See Exhibit D (TSSAA Board of Control Minutes from June 11-12, 1997 Meeting)].

44. Any public high school in Tennessee is free to join TSSAA or to refrain from joining TSSAA. [Affidavit of Jerome V. Sailors].

RESPONSE: This statement is disputed. [See Response to Statement Nos. 2, 4].

Respectfully submitted,

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[Certificate of Service omitted in printing.]

CONSTITUTION

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

Article I
Name and Purpose

Section 1. The name of the corporation shall be the Tennessee Secondary School Athletic Association, and hereafter shall be referred to as TSSAA.

Section 2. The purposes of the corporation shall be as stated in the Charter of Incorporation and, in addition, to simulate and regulate the athletic relations of the secondary schools in Tennessee.

Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate the athletic and scholastic programs. The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

Article II
Athletic Districts

Section 1. For the purpose of administration only, the state shall be divided by counties into the following athletic districts:

First Athletic District: Carter, Hamblen, Sevier, Claiborne, Hancock, Sullivan, Cocke, Hawkins, Unicoi, Grainger, Jefferson, Washington, Greene, Johnson.

Second Athletic District: Anderson, Loudon, Roane, Blount, McMinn, Scott, Campbell, Monroe, Union, Knox, Morgan.

Third Athletic District: Bledsoe, Marion, Rhea, Bradley, Meigs, Sequatchie, Hamilton, Polk, Van Buren.

Fourth Athletic District: Bedford, Franklin, Pickett, Cannon, Grundy, Putnam, Clay, Jackson, Rutherford, Coffee, Lincoln, Smith, Cumberland, Marhsall, Warren, DeKalb, Moore, White, Fentress, Overton, Wilson.

Fifth Athletic District: Davidson, Robertson, Sumner, Macon, Stewart, Trousdale, Montgomery.

Sixth Athletic District: Cheatham, Houston, Maury, Dickson, Humphreys, Perry, Giles, Lawrence, Wayne, Hickman, Lewis, Williamson.

Seventh Athletic District: Benton, Fayette, Henry, Carroll, Hardeman, McNairy, Chester, Hardin, Madison, Decatur, Henderson.

Eighth Athletic District: Crockett, Haywood, Obion, Dyer, Lake, Tipton, Gibson, Lauderdale, Weakley.

Ninth Athletic District: Shelby.

Athletic Districts 1, 2 and 3 shall comprise the Grand Division of East Tennessee; Athletic Divisions 4, 5 and 6 shall comprise the Grand Division of Middle Tennessee; and Athletic Districts 7, 8 and 9 shall comprise the Grand Division of West Tennessee.

Article III
Board of Control

Section 1. Administration: The administrative authority of the TSSAA shall be vested in a Board of Control composed of nine members. This Board of Control shall be composed of one representative from each Athletic District, who shall be elected to serve for a period of three years. The terms of office of three of the members of the Board of Control, one from each Grand Division of the state, shall expire each year.

Section 2. Elections: The election of members of the Board of Control shall take place in an annual meeting of the schools of each Grand Division. Nominations shall come from within the district of the member whose term is expiring, and only the members of that Athletic District may vote for their representative on the Board of Control. Each member school of the Athletic District that is represented at the meeting by the principal, or other faculty member, shall be entitled to one vote. In the event of a tie vote, the tie will be broken by a vote of the schools in that Grand Division of the state attending the regional meeting.

The term of office for members of the Board of Control shall begin at the March meeting following their election.

All members of the Board of Control must be principals or superintendents. (An assistant principal who devotes full time to administrative duties shall be eligible to serve.) County superintendents shall not be eligible for membership, nor shall city superintendents of systems of more than one four-year high school or senior high school be eligible for membership. A principal or superintendent cannot serve as a member of the Board of Control and as a member of the Legislative Council at the same time.

Section 3. Officers: The officers of the Board of Control shall be a president and a vice president. These officers shall be elected annually by the members of the Board of Control and each shall perform the duties usually required of the office. The President and Vice-President of the Board of Control shall serve as President and Vice-President of the TSSAA. The President of the Board of Control shall also attend all meetings of the Legislative Council. The Executive Director shall act as Secretary of the Board of Control.

Section 4. Vacancies: Withdrawal from the teaching profession, suspension or lapse of membership of the school represented, or removal from the Athletic District represented shall immediately terminate membership on the Board of Control, and the vacancy shall be filled as provided below.

Vacancies on the Board of Control shall be filled by the members of the Board of Control representing the Grand Division wherein the vacancy occurs. Such members shall serve until the next annual meeting of the member schools of the Grand Division, at which time vacancies shall be filled by regular election.

Section 5. Power and Duties of Board of Control: The Board of Control shall:

(a) Have general control over all athletic contests in which member schools participate.
(b) Elect an Executive Director and delegate to him the authority to interpret and to enforce the Constitution and Bylaws of the TSSAA.
(c) Provide office facilities and employees for properly conducting the business of the Association. (The Tennessee

Secondary School Athletic Association is an Equal Opportunity Employer.)

(d) Determine and authorize all necessary expenditures of money in the conduct of the affairs of the Association.

(e) Determine methods of, and qualifications for, registration of officials; revoke registration of any official for just cause.

(f) Act as a final court of appeals.

(g) Have authority to rule on any cause not covered by the Constitution and Bylaws, until the Legislative Council adopts a rule covering the situation.

Section 6. Meetings: The Board of Control shall meet in August, November, January, March and June. Other meetings may be called by the President of the Board of Control.

Section 7. Quorum: A majority of the members of the Board of Control shall constitute a quorum for the transaction of business.

Article IV
Legislative Council

Section 1. Legislative Body: The legislative body of the TSSAA shall be a Legislative Council composed of nine members. Members shall consist of one representative from each Athletic District elected to serve for a period of three years. The terms of office of three of the members of the Legislative Council, one from each Grand Division of the state, shall expire each year.

Section 2. Election: The election of members of the Legislative Council shall take place in an annual meeting of the schools of each Grand Division.

Nominations shall come from within the district of the member whose term is expiring, and only the members of that Athletic District may vote for their representative on the Legislative Council. Each member school of the Athletic District that is represented at the meeting by the principal, or other faculty member, shall be entitled to one vote. In the event of a tie vote the tie will be broken by a vote of the schools in that Grand Division of the state attending the regional meetings.

The term of office for members of the Legislative Council shall begin at the March meeting following their election.

All members of the Legislative Council must be principals or superintendents. (An assistant principal who devotes full time to administrative duties shall be eligible to serve.) County superintendents shall not be eligible for membership, nor shall city superintendents of systems of more than one four-year high school or senior high school be eligible for membership. A principal or superintendent cannot serve as a member of the Legislative Council and as a member of the Board of Control at the same time.

Section 3. Officers: The officers of the Legislative Council shall be a president and a vice president. These officers shall be elected annually by the members of the Legislative Council and each shall perform the duties usually required of the office. The President of the Legislative Council shall also attend all meetings of the Board of Control. The Executive Director shall act as Secretary of the Legislative Council.

Section 4. Vacancies: Withdrawal from the teaching profession, suspension or lapse of membership of the school represented, or removal from the Athletic District represented shall immediately terminate membership on the

Legislative Council, and the vacancy shall be filled as provided below.

Vacancies on the Legislative Council shall be filled by the members of the Legislative Council representing the Grand Division wherein the vacancy occurs. Such members shall serve until the next annual meeting of the member schools of the Grand Division, at which time vacancies shall be filled by regular election.

Section 5. Duties: The Legislative Council shall make necessary amendments to the Constitution and Bylaws and act upon suggestions submitted by 25 members of the Association.

Section 6. Meetings: The Legislative Council shall meet in December during the week of the state football championships and in March during the week of the state basketball tournaments. Other meetings may be called by the President of the Legislative Council.

Section 7. Quorum: A majority of the members of the Legislative Council shall constitute a quorum for the transaction of business.

Article V
Executive Director

Section 1. The Executive Director shall be elected for a term of three years by the Board of Control.

Section 2. Under the direction of the Board of Control, the Executive Director shall receive, hold, expand and account for all funds of the Association.

Section 3. He shall maintain the records and property of the Association.

Section 4. He shall initiate investigations, conduct hearings, collect information, render decisions and fix penalties based on the evidence, and in accordance with the rules and regulations of the TSSAA. Such decisions shall be subject to review by the Board of Control on appeal by the principal of the member school involved.

Section 5. He shall attend all meetings and serve as Secretary of the Board of Control and of the Legislative Council.

Section 6. He shall be an ex-officio member of all committees of the Board of Control and of the Legislative Council.

Section 7. He shall administer the rules and regulations governing the certification of officials as directed by the Board of Control.

Article VI
Hearings

Section 1. Any school charged with violating TSSAA regulations shall be notified of such charges by the Executive Director. If a hearing is desired by the school involved, the Executive Director must be notified immediately in writing. Provisions will then be made for such hearing, and the school so notified.

Section 2. A member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing. Hearings shall be conducted by the Executive Director in the presence of two or more

members of the TSSAA Board of Control who represent the Grand Division of the state in which the school is located, and who shall act in an advisory capacity. After testimony has been heard, the Executive Director shall meet in executive session with the members of the Board of Control who are present at the hearing. After discussing with the Board members the evidence and possible penalties, the Executive Director shall decide what penalty, f any, is to be placed against the school.

Section 3. Any decision of the Executive Director may be appealed to the Board of Control. If the decision of the Executive Director is sustained, the school making the appeal shall defray the expenses for the meeting of the Board of Control in case a special meeting of the Board is called to consider the appeal.

Section 4. No member of the Board of Control shall serve while a case involving the school which he represents is being heard.

Article VII
Amendments

Section 1. The Constitution may be amended by a majority of the membership of the Legislative Council. The action of the Legislative Council shall be final except that any amendment it makes may be appealed to the entire membership upon request of 25 members of the Association submitted to the Executive Director in writing. An appeal to the membership must be participated in by at least 51 percent of the total membership or the appeal will be void. A two-thirds majority of those voting will be necessary to reject a regulation adopted by the Legislative Council. Any item, not on the regional agenda, that is submitted by a member school to the Legislative Council must be in writing and submitted

to the Executive Director no later than four weeks prior to the meeting of the Legislative Council at which the item is to be submitted. Any item to be placed on the agenda of the Legislative Council must be submitted by the chief administrator of a member school, a committee established by the TSSAA Board of Control, Legislative Council or members of the TSSAA staff.

Section 2. The Legislative Council shall not act on any proposed rule changes affecting any sport sponsored by TSSAA unless the proposed change has been called to the attention of the membership by letter or by being printed in the TSSAA bulletin.

Article VIII
Regional Meeting

Section 1. Regional meetings shall be held in November and/or December of each year at Jackson, Nashville and Knoxville for the purpose of electing members to Board of Control and Legislative Council and of considering proposals to amend the Constitution and Bylaws or other legislative proposals. Proposals for consideration at regional meetings may be submitted by member schools, the Board of Control, or the Legislative Council. All such proposals must be submitted to the Executive Director in writing not later than October 15 of the year they are to be presented at the regional meetings. The Executive Director shall furnish all member schools with a list of all legislative proposals prior to the regional meetings, and the school or group responsible for each proposal shall be indicated. A committee composed of the President and Vice-President of the Legislative Council, the President of the Board of Control, and the Executive Director shall determine the order in which these proposals shall be considered at the regional meetings.

Each member school, provided it is represented by the principal, or by a faculty member designated by the principal, shall be entitled to one vote on all matters considered at the regional meeting held in its area, unless the Board of Control rules in advance of the regional meeting that certain items on the agenda shall not be voted on by the entire membership but that the vote shall be limited to schools concerned with a particular question. Non-voting faculty representatives of member schools have the privilege of speaking for or against any proposal considered.

The action of the member schools at the three regional meetings shall be used as a guide by the Legislative Council in adopting or rejecting legislative proposals.

* * * *

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

BYLAWS

Article I
Membership

Section 1. Secondary schools (also junior high schools) in the state, which are approved by the State Department of Education, State Department of Education approved agencies (Schools must be in category 1, 2 or 3.) and/or the Southern Association of Colleges and Schools, both private and public, desiring membership in TSSAA may make application to the Board of Control. Applications for membership shall be approved or rejected by the Board of Control.

Member schools that withdraw from the TSSAA membership must be an affiliate member for one year upon application to renew membership.

Section 2. There shall be two divisions for athletic competition - the Senior High Division and the Junior High Division. For tournament competition in the Senior High Division, there shall be two categories. Division I shall be schools whose student-athletes do not receive need-based financial aid. Division II shall be those schools whose student-athletes may be the recipients of need-based financial aid.

Schools which include grades 7-12, 8-12, 9-12 and 10-12 may compete in the Senior High Division. Schools in transition, if they desire, may compete in the Senior High Division after the 10th grade has been added.

Schools which include grades 7, 8 and 9, grades 8 and 9, or grade 9 may compete in the Junior High Division. (It will, therefore, be possible for some schools to compete in both the Senior and the Junior High Divisions, while other schools will be able to compete in only one of the divisions. Even though the school may participate in both divisions, it will hold only one membership in TSSAA.)

Schools with grades 7, 8, 9, grades 8 and 9, or grades 9 may compete in Senior High Division against Senior High Division "B," teams in regular-season contests and "B"-team invitational tournaments provided they use eighth- and ninth-grade students only.

Section 3. The annual dues for a senior high school in Class A shall be $150.00, in Class AA $200.00, in Class AAA $250.00 and for a junior high school shall be $100.00. (All TSSAA schools will pay membership dues based on where their enrollment would place them in the Division I, three-classification plan.). The TSSAA Legislative Council may not increase membership dues unless the increase is approved by a vote of TSSAA member schools.

Membership dues shall be paid in advance and shall be for the calendar year.

Section 4. Membership expires at midnight on December 31 of each year. Schools failing to renew membership before January 1 shall be charged a penalty of $25.00. The Executive Director shall notify by registered letter the principal of any school that has not renewed membership by January 1 and advise the principal that unless the membership fee and the penalty are filed immediately the school will be dropped from the list of member schools.

Financial Statement

Section 5. The fiscal year of the Association shall be from July 1 to June 30. At the close of the fiscal year, the Executive Director shall publish a financial statement. All surplus funds shall be used as directed by the Board of Control.

Suspension

Section 6. The Executive Director and/or the Board of Control shall have power to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause. The period of suspension or other penalty shall be left to the discretion of the Board of Control where the penalty is not fixed.

Section 7. Any school under suspension, if it has restricted its athletic program to intramural athletics for the period of suspension, may be reinstated by the Board of Control upon application made in writing, 20 days in advance of the time it desires to be reinstated, to the Executive Director by the principal of the school and by the Board of Education under which the school operates. The Executive Director shall present the application of the suspended school to the Board of Control for its consideration. The principal and the board of education shall agree in writing that the school will abide by all rules of the Association in the future. The principal and each member of the board of education shall sign the statement.

Section 8. If a school with one or more two-year contracts has its athletic program in any sport suspended for violation of TSSAA regulations - and the first game of the two-year contract has been played at the offending school - such school shall be required to complete the contract, or

contracts, when it resumes its athletic program if the school, or schools, affected desire.

Section 9. Suspension of a member school shall free all existing contracts between that school and other member schools.

Section 10. An attempt by a member school to permit a player to participate who has been declared ineligible by TSSAA shall free all existing contracts between that school and other member schools.

Section 11. Contracts made and entered into by member schools may be cancelled by mutual agreement or by authority of the Board of Control. All contracts between two schools shall be signed by the principals contracting.

Sponsored Sports

Section 12. TSSAA shall sponsor the following sports: baseball, girls softball, basketball, cross country, football, golf, tennis, track and field, girls volleyball, girls soccer, soccer and wrestling.

Cooperative Programs

Section 13. Two schools may petition TSSAA for permission to have a cooperative program in team sports (football, girls volleyball, basketball, baseball, girls softball, girls soccer and soccer) if one of the schools does not have that program or has not had that program for the last five years. Only schools with the same grade configuration may combine to form a team and schools may co-op with only one other school (a maximum of two schools may combine to form a team). The Executive Director of TSSAA may approve such co-op programs subject to approval by

principal of schools involved, school board of the schools involved, and the TSSAA Board of Control. When a co-op program has been formed between schools it must be re-evaluated after one year and is subject to approval by the Executive Director.

A student attending the ninth grade at a junior high school which terminates at the ninth grade may participate for the senior high school for which it is the feeder school, provided: (a) both schools are under the jurisdiction of the same board of education; (b) the student resides in the zone of that high school; and (c) the student does not have the opportunity to participate in that sport at the junior high school because the junior high school does not offer that sport.

Article II
Eligibility Rules

The member high schools of the Tennessee Secondary School Athletic Association have adopted, through their elected representatives, an essential inter-related group of minimum eligibility requirements which establish the threshold for participation for all students within the interscholastic program and which work together to define and preserve the fundamental nature of the program.

Academic Rules

Section 1. To be eligible to participate in athletic contests during any semester:

(a) The student shall have made a passing grade the preceding semester in at least five full unit subjects or their equivalency, provided the student is in class five days a week. If a school or school system averages the first and

second semester to determine credit for the entire year in a subject, the yearly grade may be used to determine eligibility for the fall semester. *Preceding semester is the last semester school was in session.* If a student is forced to withdraw from school, or is prevented from enrolling in school, due to illness or accident to the student, the principal may submit to the Executive Director full details concerning the illness or accident and request a ruling in regard to the student's eligibility, provided the student was eligible at the time the illness or accident forced the student to withdraw or prevent the student from enrolling in school. If ruled eligible, such a student shall be charged with a semester of attendance for athletic purposes for the semester of non-attendance or withdrawal.

A student who returns to a member school after attendance at a school of correction or alternative school may be eligible for athletic participation provided the school of correction or alternative school is accredited by the Tennessee State Department of Education and provided the student returns to the school attended before entering the school of correction.

Any student assigned by the juvenile court to Tennessee Preparatory School shall be eligible for athletic competition upon entering. After one full semester, the student must meet all eligibility standards to continue his/her eligibility.

(b) Students shall be regularly enrolled, in regular attendance, and carrying at least five full courses. A student shall be considered as regularly enrolled after the student has attended for three days, has engaged in three or more days of football, girls volleyball, cross country, golf or girls soccer practice during the period on or after August 1, or has participated in an athletic contest in any sport.

Section 2. For athletic purposes the scholastic record filed in the office of the principal or superintendent at the end of a semester shall be final. Credits earned in a summer school accredited by the State Department of Education shall be recognized for eligibility purposes provided the student was enrolled during the spring semester immediately preceding the summer session and attended at least 40 days of that spring semester.

Section 3. A student who drops out of school before the end of the semester shall be ineligible to participate in secondary school athletics until the student has been in school a semester and has passed in at least five full unit subjects. (To become eligible under this regulation, a student must attend school for at least 40 days of the semester, but in no case shall the eligibility become effective until the beginning of the succeeding semester.)

* * * *

High School Graduate

Section 4. No student shall be eligible to participate in athletics after he or she has graduated from a secondary school. (A student who takes an accelerated course shall not lose his or her eligibility even though that student earns enough units to graduate provided he or she does not participate in a graduating exercise or accept a high school diploma, and provided the student has not attended a secondary school for eight semesters after enrolling in the ninth grade.)

Eight-Semester Rule

Section 5. A student shall be ineligible to compete in any sport if he or she attended a secondary school, or schools, for

eight semesters of four and one-half months each. Attendance of 40 school days of any semester shall be regarded as a "semester" under this rule. If a student participates in athletics during a period of attendance of any number of days less than 40, he or she shall be charged with a semester of attendance. Attendance in junior high school shall be taken into consideration in determining the number of semesters a student has been in school.

A student who registers for two or more ninth grade subjects after having completed one school year in the eighth grade shall be classified as a high school student for athletic purposes.

The seventh and eighth semesters shall be consecutive.

* * * *

Years of Participation

Section 6. A student who has participated in one first-team game, or B-team game, for any length of time shall be regarded as having played one year. A student shall not play more than four years in any sport while he or she is enrolled in high school.

Grade and Season Participation

Section 7. In a school organized on the six-six plan, the eight-four plan, or the one-twelve plan, eighth-grade students may compete as members of the high school team. Any student repeating the eighth grade shall not be eligible for high school participation during the year that the student is repeating the eighth grade.

Any student repeating the seventh grade after having passed the seventh grade or repeating the eighth grade after passing the eighth grade shall not be eligible to participate in athletics during their ninth-grade year.

Such participation shall not count as one of the four seasons a student is allowed to participate after enrolling in the ninth grade, but such student will be considered as having an athletic record in so far as the transfer rule is concerned. Students in a grammar school or junior high school which are administered under a different principal than that of the high school shall be ineligible to compete as members of the high school team except as members of an approved cooperative program as described in Article I, Section 13.

A student shall not participate in more than one complete season in a sport in a school year.

* * * *

Age Limit

Section 8. No student shall be eligible to participate in any athletic contest during any school year if he or she becomes 19 years of age on or before September 1. The age rule may be waived for the Tennessee School for the Blind when this school is competing with other schools for the blind provided such schools are permitted by their state associations to waive the age rule in competing with other schools for the blind. (Effective with the 1998-99 school year no student shall be eligible to participate in any athletic contest during any school year if he or she becomes 19 years of age on or before August 1.)

* * * *

B Teams and Six-Quarter Rule

Section 9. The membership of a B team shall be composed of all varsity substitutes and any other players that are certified to TSSAA.

All eligibility rules will apply at the varsity level only in high and junior high school. At the junior varsity or B-team level, only the age, semester, academic and repeating rules will apply. Students in violation of any of these four rules will be ineligible to participate at any level. Students that are ineligible as a result of any other rules may participate at the B-team level in either junior high or varsity athletics.

A player shall not participate in more than six quarters of play in one day during regular-season contests. (A player who enters a game for any length of time during a quarter shall be charged with a quarter's participation.)

B teams shall comply with all other TSSAA regulations.

Independent-Game Participation

Section 10. After a student's name is listed on the school eligibility report, the student shall not participate in an independent game until the season has closed or his or her name has been removed from the eligibility report at the request of the school principal.

Any game in which players not registered with TSSAA participate - regardless of whether admission is charged - is considered as an independent game. Violation of this rule will render the student ineligible for 25% of the number of contests allowed in that sport by the sports calendar or for the remainder of the season in that sport, whichever number is the least. Violation of this rule a second time in the same

sport in the same season will render the student ineligible in that sport for the remainder of the season.

A student's name may be removed from the school's eligibility list upon written request of the principal. After such a request has been filed with the state office, a student may then participate as an independent without penalty. If a principal requests the state office to remove a student's name from the school's eligibility list, such student may not again be certified during the season of that sport.

* * * *

All-Star Games

Section 11(a). No student shall be permitted to participate in an all-star game unless it is sanctioned by the TSSAA and unless he/she has completed high school eligibility in that sport; (b) no individual player is allowed to participate in more than two sanctioned all-star contests during the school year; and (c) any student who fails to comply with the preceding requirements loses athletic eligibility for a period of time to be determined by the Board of Control. This rule reflects the present NCAA rule involving all-star games and is designed to parallel those regulations.

An all-star game is defined as any contest (where admission is charged either directly or indirectly) in which one or both teams is composed of players selected from two or more regularly constituted teams. This regulation does not apply to summer baseball and girls softball.

Any all-star game beginning after March 1, 1997, and involving TSSAA athletes must be sanctioned by the TSSAA. A filing fee of $250.00 is required for the game to be considered for sanctioning. If the game is approved then

an additional approval fee of $750.00 is required. If the request is denied, then all fees shall be refunded. This fee is required for games involving groups not affiliated with the TSSAA and only upon initial application.

No member school shall permit use of its equipment, facilities, or of its employees, directly or indirectly, in the management, coaching, officiating, supervision, or promotion of player selection of any unsanctioned all-star team or contest during the school year.

* * * *

Transfer Rules

"Transfer student" - a student who has transferred schools due to a bona fide change of residence by his or her parents or guardians or a student who has transferred schools and has not completed all the grades of his or her former school (school from which student is transferring).

"Transfer student with an athletic record" - a transfer student who has participated in a contest (varsity, B team or junior high) in the last 12 months at a member school or a school holding membership in the state high school athletic association of another state that holds membership in the National Federation of State High School Associations.

Section 12 - 16 apply to "transfer students with an athletic record".

Section 12. The official scholastic and athletic record of a transfer student must be attested by certificate from the principal of the former school. A transfer student shall not participate in athletics in the school to which he or she transfers until a transcript of his or her work and athletic

record has been received by the principal and his or her eligibility has been approved by the Executive Director.

Section 13. If a student enrolled in a member school or a state athletic association school holding membership in the National Federation of State High School Associations who has an athletic record the previous or current school year in football, basketball, baseball, girls softball, or track and field transfers from one school to another without a corresponding change of residence by his or her parents or guardians, the student shall be ineligible for athletic competition in these five sports for 12 months. If a student enrolled in a member school or state athletic association school holding membership in the National Federation of State High School Associations who has an athletic record the previous or current school year in golf, tennis, wrestling, cross country, girls volleyball, girls soccer or soccer transfers from one school to another without a corresponding change in the residence of his or her parents or guardians the student shall be ineligible for 12 months in whichever sport he or she has an athletic record. After being out of athletic competition for a period of 12 months a student may become eligible at any member school provided he or she meets other eligibility requirements.

A student who attends a member private, parochial, or public school other than the school to which he or she is zoned and participates in athletics cannot transfer to another school within the territory served by these schools without losing his or her eligibility for a period of 12 months - even though there is a change of residence.

A student who attends a public school to which he or she is zoned and participates in athletics and transfers to a private, parochial, or public school other than the school to which he or she is zoned and the new school is in the territory or zone

of his or her original school shall be ineligible for 12 months - even though there is a change of residence.

A student who attends a public school in a city or county which has definite school zones prescribed by the Board of Education and participates in athletics may become eligible at another city or county school if his or her parents move into that school zone. Such a student will be ineligible if he or she transfers to a private, parochial, or public school other than his or her zoned school.

If an athlete's parents move during the school year from one school district or territory into another district or territory, the athlete may transfer without loss of eligibility to the school serving the district or territory into which his or her parents have moved: (a) at the time his or her parents change residence; (b) at the end of the next report card period; (c) at the close of the semester; (d) at the close of the school year.

If the parents or guardian of a student with an athletic record move after the athlete has been enrolled in a school for one year or longer, the athlete may continue to attend and retain his or her eligibility provided his or her parents pay the expenses incurred as a result of the student not living at home.

When a student makes a transfer due to the change of the residence of his or her parents or guardians, the student shall be ineligible until the Executive Director has reviewed his or her case and has declared him or her eligible.

If a student has been ruled eligible as a result of a change of residence by an athlete's parent(s) or guardian from residence A to residence B and a transfer of schools from a school serving residence A to a school serving residence B, and the parent(s) or guardian of the student return to

residence A before the student has been enrolled in the school serving residence B for one complete year, the student will be ineligible for 12 months from their last participation date.

If an ineligible contestant competes in a contest(s) and forfeitures occur as a result of the ineligibility and the student is then ruled eligible to compete, the student will be ineligible to participate in twice the number of contests in which he/she participated as an ineligible student-athlete or he/she will be ineligible for the remainder of the season, whichever is the least.

Section 14. If a student with an athletic record the previous or current school year enters a school with higher grades, or a school with the same number of grades above the seventh grade, without having finished all the grades of his or her former school, he or she shall be ineligible for one year - except (a) that a student who has completed the eighth grade, and who is no longer eligible to participate on a junior high team because of age, may transfer to the public high school serving the district in which the student resides; (b) that a student who has completed the eighth grade may transfer to a senior high school in the system with grades 9, 10, 11 and 12, or a student who has completed the ninth grade may transfer to a senior high school in the same system with grades 10, 11 and 12 provided such transfer is approved by the board of education. (This rule shall not apply to students who transfer from junior high schools that do not hold membership in their state high school athletic associations, or TSSAA.)

Section 15. Students who change their school due to a bona fide change or establishment of bus routes by the county board of education and by the county superintendent shall not forfeit their eligibility. In cases where such a change in

bus routes makes it equally convenient for a student to attend another school or the school in which he or she already has an athletic record, such student cannot transfer without losing eligibility for a period of 12 months.

Section 16. A student with an athletic record who transfers from a school where the student is under discipline shall be ineligible for 12 months or until the disciplinary charges have been removed.

* * * *

Foreign-Exchange Programs

Section 17. To be eligible to participate in athletic contests a foreign-exchange student must be in a foreign-exchange program which has been approved by the Council on Standards for International Educational Travel (CSIET).

* * * *

Residence Rule

Section 18. To be eligible, any transfer student or student who has changed schools after having completed the highest ending grade at their his/her school shall live at home with his/her parents or duly appointed guardians. They must live with their duly appointed guardian for a minimum of 12 months. Where the application of this rule works a manifest injustice, the Board of Control may make an exception after student has been in school for 12 months from date of entry.

This regulation shall not apply to a boarding student at a private school nor to a student who is forced to change residence or guardianship due to the dissolution of his or her home by death, separation (provided divorce papers have

been signed and processed through the courts), or divorce of parents. If a student has been living with a family for a period of 12 months, or longer, it shall be assumed for athletic purposes that the head of the family is the student's guardian.

An athlete will be eligible to participate in athletics where the parents are divorced or separated (provided divorce papers have been signed and processed through the courts) the first time he or she changes residence from one parent to the other parent, after establishing an athletic record or practice record, provided there has been a court-ordered custody change and provided the principal of the student's former school indicates that the move was not for athletic reasons. An athlete will be eligible to participate in athletics the first time the student changes residence from a guardian other than a parent to either one or both parents, after establishing an athletic record or practice record, provided there has been a court-ordered custody change and provided the principal of the student's former school indicates in writing that the move was not for athletic reasons.

All such cases must be submitted to the Executive Director and the eligibility of the student established before he or she participates.

* * * *

Practice Rule

Section 19. A student who engages in three or more days of practice with a school in which the student is enrolled shall be ineligible in that sport for that season if the student enrolls in another school without a corresponding change in the residence of the student's parents. A student who engages in three or more days of off-season practice with a school in which the student is enrolled shall be ineligible in that sport

the following season if the student enrolls in another school without a corresponding change in the residence of the student's parents. This rule shall apply to football, girls volleyball, girls soccer, basketball, wrestling, girls softball, baseball and soccer. Refer to Article II, Section 1(b) for definition of enrollment.

Date of Enrollment

Section 20. A student shall not participate in athletics during any semester unless he or she is duly enrolled on or before the 20th school day of the semester. This rule shall not apply to transfer students who have met the attendance requirements in the school last attended.

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would reuslt in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

   Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

   Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule" and Understanding "What Is Undue Influence?"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12-, 13-, 14-year-old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

Amateur Rule

Section 22. A student who has never used and is not using his or her knowledge of athletics or his or her athletic skill for pay in the sports which this Association governs and who has always contested under his or her own name is an amateur. (Accepting money for officiating athletic contests or for working as an employee in a city or county recreation program is not a violation of this regulation.) A student who violates the amateur rule shall be ineligible for 12 months in the sport in which the violation occurs.

Such a student may be reinstated as an amateur after a period of one calendar year from the time he or she was declared ineligible has elapsed, provided he or she has not violated the amateur rule during this period.

A student who signs a professional baseball contract shall be ineligible to participate in high school sports after the signing of such contract.

Award Rule

Section 23. A student may accept a medal, trophy, high school letter, sweater, jacket, shirt, blazer or blanket but nothing else of commercial value. (A sweater, jacket, shirt, blazer or blanket must carry the high school letter or other appropriate award emblem.) None of the approved awards shall be accepted from an individual or a non-school organization unless the giving of such award has been approved by the principal of the school the athlete attends. Acceptance of forbidden awards will cause a student to become ineligible for 12 months in the sport in which the violation occurs. Golf and tennis students will abide by USGA and USTA regulations in accepting awards.

Section 24. A member school that has any connection with the presentation of a forbidden award - such as assisting in the selection of the person to receive the award, permitting the award to be given at a school function, or holding the award for a student until he or she has graduated - shall be subject to penalty.

* * * *

College Attendance

Section 25. No person is eligible who has ever attended college or who has played on a junior college, senior college, or university team.

Student Employment

Section 26. A student who is filling a place as librarian, monitor, secretary, janitor, waiter, or any other position for which that student receives a consideration shall be ineligible to take part in any athletic contest until the Executive Director shall have passed on the case and decided that the service rendered is adequate return for the concession made.

* * * *

Tuition and Financial Aid

Section 27. If tuition is charged, it must be paid by parent, bona fide guardian or other family member. If a parent, guardian or other family member secures a loan for payment of tuition, it must remain an obligation of the parents, guardian or other family member to repay the principle and interest in full with no exceptions. Financial aid will be allowed under the following conditions:

1. Children of full-time faculty members may be given financial aid, but such students, if transfers, shall be ineligible for 12 months in any sport in which they have an athletic record for the previous or current year.

2. Financial aid may be awarded on the basis of need, but proof of such need must be filed in the TSSAA office on forms approved by the Executive Director. In order to determine the basis for need, all schools awarding financial aid shall use the School and Student Scholastic Service for Financial Aid of Princeton, New Jersey. A committee consisting of five School Heads from Division II schools, selected by these schools, and one ex-officio, non-voting member from the Board of Control will meet and make recommendations to the TSSAA Board of Control on each

student submitted. In addition, this committee will collect information from schools regarding financial aid statistics, grant procedures, and the overall financial aid program within the school. The TSSAA Board of Control will then rule on all cases at the August meeting. The TSSAA Board of Control shall have authority to reject the basis for need for students when in its opinion, or the opinion of the school committee, the amount of need stated by School and Student Scholastic Service for Financial Aid of Princeton, New Jersey, cannot be justified.

3. Any loan program, grant program, educational foundation or similar program that is established and/or administered, in whole or in part, by a school or official of a school is considered financial aid.

Schools shall remove any student from athletic eligibility whose accounts with the school are 60 days overdue.

All records pertaining to financial aid or tuition assistance shall be open to TSSAA upon its request. Each school shall be responsible for securing necessary authorization to allow TSSAA to review or audit such records.

Specialized Camps

Section 28. All expenses of an athlete who attends any athletic camp where specialized instruction is offered in any sport sponsored by TSSAA must be paid by the athlete or his or her parents.

Setting Aside Eligibility Rules

Section 29. No part of these eligibility rules shall be set aside by mutual agreement for any contests whatsoever nor

shall they be supplemented in any contest held under the jurisdiction of this Association.

Special Cases Involving Hardship

Section 30. Except for the eligibility rules in regard to age and to the number of semesters in school, the Executive Director shall have authority to set aside the effect of any eligibility rule upon an individual student when in his opinion the rule fails to accomplish the purpose for which it is intended or when the rule works an undue hardship upon the student.

The conditions causing the student to fail to meet the eligibility requirements must have been beyond the control of the school, the student and/or his or her parents, and such that none of them could have reasonably been expected to comply with the rule the violation of which is involved.

If the student has transferred from another school, it is recommended that a statement be filed from the administration of the previous school regarding the transfer. (The statement shall explain why the transfer is being made and give any other information that should be taken into consideration in deciding whether the student shall be eligible to participate in athletics.)

Any decision of the Executive Director may be appealed to the Board of Control at the August, November, January or March meetings.

If any hardship appeal is received after one week prior to the Board of Control meeting, the school will have to pay for additional expenses in order to get material to the Board.

Each school must have an administrator (principal, assistant principal or athletic director) from that school present in order to appear before the Board of Control regarding an appeal.

Physical Examination and Parental Consent

Section 31. It is required that no student be permitted to participate in practice sessions or in athletic contests until there is on file with the principal a preparticipation medical evaluation form signed by a properly licensed doctor of medicine that the student has passed a physical examination, not prior to May 1, and that in the opinion of the examining physician, the student is physically fit to participate in interscholastic athletics. Physician assistants and nurse practitioners may conduct routine preparticipation medical evaluations on athletes according to this form under the supervision of a physician or team doctor at the sole discretion of the TSSAA. The official signature on the form must be that of the supervising physician.

No student shall be required to submit to a physical exam if his/her parent(s) or legal guardian shall file with the principal a signed, written statement (affirmed under the penalties of perjury) declining such physical examination on grounds of sincerely held beliefs or practices.

It is required that no student be permitted to participate in practice sessions or in athletic contests until there is on file a parental consent certificate signed by a parent or legal guardian stating that the student has the consent of his or her parent(s) or legal guardian to participate.

Forfeitures

Section 32. All rulings on eligibility must be in writing, and the accidental, intentional or other use of ineligible players by a member school shall require that team victories in which the ineligible player participated are forfeited to opponents; and any one or more of these additional actions may be taken:

(a) That individual or team records and performances achieved during participation by such ineligibles be vacated or stricken;

(b) That team or individual awards earned by such ineligibles be returned to the TSSAA; and

(c) That a fine for the playing of an ineligible player be assessed against the school, if deemed necessary.

Section 33. If a team is removed from competition, the contest is forfeited to the opponent and the school will face disciplinary action by TSSAA. In addition, the coach and principal of the removed team must appear before the Executive Director to indicate why additional disciplinary action should not be taken.

Section 34. If the coach is ejected from the contest and an assistant coach or full-time employee of the board of education that possesses a teacher's certificate and is assigned as a school representative is not available to continue as coach, the event is terminated and forfeited to the opponent.

Section 35. If a student is ineligible according to TSSAA rules but is permitted to participate in interscholastic competition contrary to such TSSAA rules but in accordance

with the terms of a court restraining order or injunction against his/her school and/or the TSSAA, and that injunction is subsequently voluntarily vacated, stayed, reversed or finally determined by the courts that injunctive relief is not or was not justified or expires without further judicial determination, those actions stipulated in Section 32 shall be taken.

Section 36. If an ineligible contestant competes in a meet, match or tournament and any violation of TSSAA rules occurs, all points earned by that student, or by a relay team of which he or she may have been a member, in that meet or tournament are to be declared forfeited; and in team sports (baseball, basketball, football, girls soccer, soccer, girls softball and girls volleyball) the entire contest is forfeited.

Article III
Schools Which Member Schools May Play or Scrimmage

Section 1. A member of the Tennessee Secondary School Athletic Association is permitted to play or scrimmage:

(a) Other members of this Association.

(b) Schools holding membership in the state high school athletic associations of other states, and which associations hold membership in the National Federation of State High School Associations.

(c) Also secondary schools operated by any agency of state government (Schools must be in category 1, 2 or 3.), provided all players allowed to represent such schools meet the TSSAA semester, transfer, scholarship, and award rule. Member schools that schedule athletic contests with schools of this type shall require such schools to file with them, and

with the state office, a form which states that all students who will participate in the contest are eligible under their association rules and that they also meet the requirements of the TSSAA semester, transfer and scholarship award rules. (This form may be obtained from the TSSAA office.)

(d) One alumni game in any sport except football. Contests with college freshmen teams in track and field, baseball, girls softball, golf, tennis and girls volleyball provided such contests do not involve more than one TSSAA team and one college freshman team.

(e) Any school with grades 9 and above which is approved by the State Department of Education, State Department of Education approved agencies (Schools must be in category 1, 2 or 3.) and/or the Southern Association of Colleges and Schools provided it has been approved in writing by the Executive Director. Such schools may compete with TSSAA member schools in regular-season contests and invitational tournaments or meets. In such contests TSSAA-approved officials will be used. Such schools will abide by the TSSAA eight semester and age rule.

(f) Any elementary or middle school with any combination of grades K-8 provided both the member school uses only students in grades 7 and 8 and the elementary or middle school uses only students in grades 7 and 8 and provided the non-member school is approved by the State Department of Education, State Department-approved agencies (Schools must be in category 1, 2 or 3.) and/or the Southern Association of Colleges and Schools provided it has been approved in writing by the Executive Director. Such schools may compete with TSSAA member schools in regular-season contests and invitational tournaments or meets. In such contests TSSAA-approved officials will be

used. Such schools will abide by the TSSAA four-semester and age rule.

* * * *

Intrastate Tournaments and Meets

Section 2. No member school shall enter any intrastate basketball, girls volleyball, wrestling, girls soccer or soccer tournament, or any intrastate track and field meet unless said tournament or meet is sanctioned in writing by the Executive Director. (This does not apply to dual, triangular or quadrangular track and field meets.)

Interstate Tournaments and Track Meets and Contests With Out-Of-State Teams

Section 3. The TSSAA is a member of the National Federation of State High School Associations.

All interstate tournaments or meets in track and field, tennis, golf, baseball, girls softball, girls soccer, soccer, cross country, girls volleyball, wrestling, basketball or football - also any single contest in any of these sports with an out-of-state team which involves a round trip exceeding 600 miles or any single contest with an out-of-state team that is sponsored by an individual or an organization other than a member school - must be sanctioned by the National Federation and the state associations concerned. Only one out-of-state trip involving travel in excess of 600 miles by a team of a member school will be sanctioned during any one season.

Schools which participate in non-sanctioned tournaments, meets, or contests, shall be subject to suspension. Applications for the sanction of an interstate tournament,

meet, or out-of-state contest involving travel of over 600 miles or the sponsorship of an individual or non-school organization shall be made to the Executive Director.

* * * *

Varsity Team

Section 4. There can be only one varsity team in any sport.

Eligibility Lists

Section 5. An eligibility list containing the name of each student who is to participate during the season in each sport shall be filed by the principal with the Executive Director and postmarked one week prior to the first contest. If a student whose name does not appear on the original eligibility list wishes to become a member of the squad, a supplementary form listing the student's name must be filed with the state office before the student is allowed to participate. The penalty for violation of this rule shall be a fine of $25.00. Any school failing to file such reports promptly along with checks for penalty, after being notified by the Executive Director, shall be subject to suspension.

Filing Schedule Reports

Section 6. Member schools shall file with the state office a copy of the schedule in each sport one week prior to the first contest. Penalty for failure to file the schedule report one week prior to playing the first contest shall be a fine of $25.00.

Coaches

Section 7. All coaches will fall under one of the following categories:

1. Full-time employee (a minimum of 100 school days) of the board of education with a Tennessee state teaching license or the equivalent.

2. Retired educator (five or more years experience) with a valid Tennessee state teaching license or the equivalent.

3. Non-faculty coach - Anyone approved by the principal, superintendent, and/or local board of education in the normal course of employment procedures in accordance with applicable state law.

A. The position has been advertised and no full-time employee with a teaching license who meets the qualifications required for coaching the specific sport in question is available.

B. All head coaches in football, basketball, baseball, girls softball, and track and field must be full-time employees with a Tennessee state teaching license (see #1 above).

C. All non-faculty coaches who are not retired educators (see #2 above) must complete the NFICEP Coaches Education Program in a TSSAA-approved course within one year of his/her employment and must continue to renew this certification every three years by completion of additional NFICEP courses. In addition, all non-faculty coaches who are not retired educators must attend the TSSAA Coaches Training Meeting annually.

D. All head non-faculty coaches in girls volleyball, cross-country, golf, wrestling, tennis, girls soccer and soccer must complete the NFICEP Coaches Education Program in a TSSAA-approved course prior to assuming the position.

E. In using retired educators and non-faculty coaches, a school shall be limited to a total of two coaches in football and one coach in all other sports. These individuals may be assistant coaches in football, basketball, baseball, girls softball, and track and field, and they may be either head coaches or assistant coaches in all other sports.

F. All coaches are subject to the TSSAA rules and regulations as regular coaches and must conduct themselves in a manner becoming of a coach and representative of the school. All coaches are responsible to the principal of his/her school.

Coaches must be paid entirely from funds approved by the board of education or the governing board of the school.

Rules Of The Game

Section 8. The official rule books as published by the National Federation of State High School Associations shall be used in football, basketball, baseball, girls softball, wrestling, girls soccer, soccer, track and field and girls volleyball. (Except for football and basketball, there shall be a $25.00 administrative fee for girls and boys teams participating in each sport. The $25.00 administrative fee shall be mailed to TSSAA prior to the playing of the first contest in each sport. Failure to send the $25.00 administrative fee prior to the first contest will result in an additional $25.00 late fee.)

Duties Of The Principal

Section 9. A principal shall furnish to the Executive Director such information as may be desired concerning eligibility of contestants, participation and reports on officials. Failure to comply within a reasonable time shall subject the school to suspension, fine or other penalty. Any eligibility or participation list shall remain on file in the principal's office for a period of not less than five years.

Number of Regular Season Football Games

Section 10. A football team shall be permitted to play a maximum of 10 games if it is participating in the football playoff series, 11 games for the first round of the football playoff series, 12 games for the second round of the football playoff series, 13 games for the quarterfinals of the football playoff series, 14 games for the semifinals of the football playoff series, and 15 games for the finals of the football playoff series. Schools that do not qualify for the fall playoff series may schedule an additional game for a total of 11 games.

Practice and Playing First Football Game

Section 11. There shall be no football practice in pads from the close of school until the date set for beginning fall practice. The date for beginning fall practice shall be August 1. A game may be played on Wednesday or Thursday preceding the Friday of the first scheduled football game.

Football Bowl Games

Section 12. A school must participate in the TSSAA region football playoff series and win at least five games in order to be eligible to participate in a football bowl game. No

member school may participate in a football bowl game if the opponent represents an out-of-state school.

Any football game scheduled after the first Friday in September - if it is sponsored by a non-school organization - or any football game scheduled at any time - if the participating teams are not named at the time the game is scheduled - will be considered as a bowl game.

Sponsors of football bowl games shall obtain written approval from the Executive Director of TSSAA before scheduling such contests. No member school shall agree to play in a bowl game without first ascertaining that the proposed game has been approved by TSSAA.

TSSAA SPORTS CALENDAR [Calendar]

Section 13. An invitational tournament shall count as two games in basketball, girls soccer, soccer, baseball and girls softball. All tournaments shall be held on consecutive days with no other regular-season games being played during the tournament unless permission is granted by the Executive Director.

In all individual sports (cross country, golf, track and field, tennis and wrestling) individuals accompanied by a coach may enter varsity competition at different sites at the same time and date, and this will count as two dates on the schools' schedule.

Any school that is starting a sport for the first time may have five days of off-season practice prior to the first season the sport begins. This would apply to girls volleyball, girls soccer, soccer, baseball, girls softball and track and field. It would not apply to football and basketball since schools are allowed 10 days in these sports.

A school may open its facilities to all students in their school and coaches may serve in a supervisory capacity only. No practice schedules may be followed, the facilities must be open to everyone in the school, and coaches may serve in a supervisory capacity only.

* * * *

Section 14. The sports season for a school shall end when the team has been eliminated from the TSSAA tournament series or has won the state championship. The sports season shall end for a school whose team does not enter the tournament series with the playing of the last regularly scheduled game.

Jamborees

Section 15. A member school may participate in one jamboree per sport provided (a) the jamboree is approved by the state office and is held before any of the participating schools play the first game; (b) the jamboree is sponsored by the participating schools and all proceeds go to the participating schools; (c) the jamboree is conducted in accordance with the following regulations:

* * * *

Conduct of Students

Section 16. A student who uses insulting or profane language or who is guilty of foul tactics, in addition to being disqualified by the referee shall be subject to such additional penalties as the Board of Control or Executive Director may deem best.

TSSAA Share in Tournament Receipts

Section 17. Fifteen percent of the gross proceeds from district and regional girls volleyball, district and regional girls soccer, district and regional soccer, regional track and field meets, invitational and regional wrestling tournaments, invitational, county, conference, district and regional basketball tournaments shall be paid to TSSAA. This regulation shall apply to junior division basketball tournaments, but not to "B"-team tournaments.

After all expenses in connection with the holding of the state tournaments in basketball, track and field, baseball, girls softball, girls volleyball, girls soccer, soccer and wrestling have been paid, any remaining funds from the gate shall be placed in the TSSAA treasury.

Awards

Section 18. TSSAA shall furnish trophies, plaques, ribbons and medals in TSSAA-sponsored sports as determined by the TSSAA Board of Control.

Use of Tobacco

Section 19. The use of tobacco in any form by coaches, officials, and athletes is prohibited at TSSAA sanctioned events.

Article IV
Officials

Section 1. (a) Officials shall be agreed upon by both schools. (b) These officials must be registered and approved by TSSAA. If a registered official who has been engaged for an athletic contest fails to appear, the principal of the home school may, with the approval of the visiting school, select an official for the contest. If this is done, the principal of the home school must mail to the Executive Director within 48 hours evidence showing that a registered official was employed for the game and that the official did not appear. The principal of the home school shall give the name and address of the registered official who was employed to officiate the game, and the name and address of the non-approved official used as a substitute.

Section 2. It shall be the duty of a game official to file immediately a report with the state office if there is any unusual incident involving unsportsmanlike conduct on the part of the players, coaches, cheerleaders, or fans.

Section 3. The Executive Director shall have authority to suspend or fine officials who are guilty of unsportsmanlike or unethical conduct or who fail to file immediately required reports with the state office. Such decisions shall be subject to review by the TSSAA Board of Control upon appeal by the official.

Section 4. An official shall be prohibited from working in an athletic contest in which a member of his or her immediate family - son, daughter, brother, sister, mother, father, husband or wife - is playing or is serving as a coach for either team. If an official is a teacher, the official is prohibited from working in an athletic contest if one of the teams represents the school in which the official is employed

as a teacher unless otherwise approved by the Executive Director.

* * * *

Contracts With Officials

Section 5. A school may drop an official from a game after the official has been engaged. If a school decides that it is wise to break its agreement with an official, it may be done by paying the official the regular fee for the game. Canceled and postponed games do not come under the above provision, provided that the official is duly notified. In the case of postponed games, the officials that were originally employed must be given the opportunity to work on the new date.

* * * *

Management of Athletic Contests

Section 6. Visiting teams shall be accompanied by the principal or someone designated by the principal.

Section 7. All games shall be properly supervised to insure sportsmanlike contests. The host school shall be responsible for providing sufficient security to insure orderly conduct on the part of all spectators. If the game is played on a neutral field and neither team is designated as the host team, the competing schools shall share the responsibility of providing sufficient security.

Member schools are responsible for the conduct of their own fans and students at every athletic contest, regardless of where it may be held.

The coach and principal of each of the schools participating in an athletic contest shall file a report immediately with the state office if there is any unusual incident involving poor sportsmanship, during or following the game, on the part of players, coaches, school administrators, game officials or spectators.

Responsibility of The Principal

Section 8. The principal of each school, in all matters pertaining to the athletic relations of his school, is responsible to this Association. The principal shall exercise control over all finances, the scheduling of contests, and all other matters involved in the management of the school=s athletic program. Any school whose athletic program is managed by a non-school group shall not be eligible to hold membership in TSSAA.

* * * *

Article V
Bond

Section 1. The Executive Director of the TSSAA shall execute annually a Surety Bond on $30,000 or more if the Board of Control directs, covering TSSAA funds held by him. The fee on this bond is to be paid from the Association funds.

Article VI
Amendments

Section 1. The Bylaws of the TSSAA shall be amended by the same method as the Constitution.

BYLAWS OF THE JUNIOR DIVISION

(Unless otherwise specified in the statements which follow, the rules and regulations of the Tennessee Secondary School Athletic Association for the Senior High Division will apply to schools participating in the Junior Division.)

RULE 1. Membership in the Junior Division shall be open to schools with grades 1-12, 7-9 and 9-12. It is mandatory that schools which participate in the Senior Division of TSSAA and have grades 8 and 9 only, or grade 9 only, register in the Junior Division if such schools have a team, or teams, composed of 9th graders, or of 8th and 9th graders which play other member schools. Such schools will hold only one membership in TSSAA but will compete in both divisions. Schools with grades 7-9 only may also hold membership in the Junior Division of TSSAA.

RULE 2. No student in a grade below the 7th can compete as a member of a team in the Junior Division. A student is not considered as enrolled in the 7th grade until he or she is scheduling all 7th grade subjects.

RULE 3. No student shall be eligible to compete in the Junior Division during any school year if the student becomes 16 years of age on or before August 1.

RULE 4. Teams registered in the Junior Division may compete with other teams registered in this division, or with similar teams in other states whose schools hold membership in the state high school athletic association. Junior high schools may play ninth grade teams from other states that do not register Junior Division teams provided all ninth grade athletes are registered with the state association or out-of-state junior high schools with grades seven through nine who meet TSSAA regulations.

RULE 5. All students participating on a team registered in the Junior Division must be enrolled in the same school and be under supervision of the same administrative head except that students enrolled in an elementary school with grades seven and eight may be certified as members of the ninth grade team of a high school with grades 9-12 provided both buildings are on the same campus, and provided there is only one elementary school in the system with grades seven and eight.

RULE 6. A school with teams in both the Senior and the Junior Division may certify a student in grades 8 and 9 as a member of the senior or the junior team, but once such student has been certified to the state office as a member of the senior team the student must continue as a member of that team for the remainder of the season for which he or she has been certified. A student in the 8th or 9th grade who has been certified as a member of the junior team may be advanced to the senior team at anytime, provided the state office is advised to strike his or her name from the junior team eligibility report and a new eligibility report is filed to show that the student has been advanced to the senior team.

RULE 7. A student shall be ineligible to compete in the Junior Division if the student has attended school for four semesters after enrolling in the 8th grade. Any student that repeats the 7th grade after having passed the 7th grade shall not be eligible until they have reached the next higher grade. Any student that repeats the 8th grade after having passed the 8th grade shall not be eligible to participate during the year in which they are repeating the 8th grade. Attendance for forty school days of any semester shall be regarded as a "semester" under the rule. If a student participates in athletics during a period of attendance of any number of days less than forty, the student shall be charged with a semester of

attendance. Any student repeating the 7th grade after having passed the 7th grade, or repeating the 8th grade after passing the 8th grade, shall not be eligible to participate in athletics during their 9th grade year.

RULE 8. To be eligible to participate in athletic contests during any semester 7th and 8th grade students shall have made a passing grade during the preceding semester in at least four subjects meeting five times per week. Two subjects which meet for a combined total of five days per week may be counted as one subject. If a school or school system averages the first and second semester to determine credit for the entire year in a subject, the yearly grade may be used to determine eligibility for the fall semester. (Scholastic requirements for 9th grade students will be found in Article II, Section I of the Bylaws.)

RULE 9. Junior Division schools that enter a county, conference, or invitational tournament in basketball, baseball, softball, volleyball, wrestling, and soccer during the season shall be charged with two games or dates.

RULE 10. No athletic contests in football, basketball or wrestling in which Junior Division teams participate may be sponsored by a non-school group organization.

* * * *

MEMORANDUM

TO: State Board of Education Members

FROM: C. Brent Poulton

DATE: May 12, 1989

RE: NOTES PERTAINING TO THE AGENDA FOR THE MAY BOARD MEETING

* * * *

II. REPORTS

* * * *

C. Annual Review and Report on Tennessee Secondary School Athletic Association Rules

The State Board delegates responsibility for high school competitive athletics to the TSSAA. Each year we reiterate this relationship, and ask the TSSAA for a report on the status of high school athletics. The event also provides an opportunity for you to ask any questions of TSSAA officials on the subject.

D. Report on Legislative Actions of 1989 Tennessee General Assembly

Chuck Cagle will summarize actions of the General Assembly.

* * * *

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton
Executive Director

DATE: May 15, 1991

RE: NOTES FOR THE MAY 31, 1991 BOARD MEETING

* * * *

IV. Career Ladder Items

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D. Consideration of Rules and Regulations of the Tennessee Secondary School Athletic Association

Our rules call for an annual consideration by the Board of TSSAA rules and regulations. In effect, this amounts to reaffirmation of the Board's decision to delegate responsibility for management of secondary school athletics to TSSAA.

* * * *

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton
Executive Director

DATE: July 12, 1991

RE: NOTES CONCERNING THE JULY RETREAT AND THE JULY 26, 1991 BOARD MEETING

Retreat

Things are shaping up nicely for the retreat. We are sticking to the work plan I shared with you at dinner prior to the May board meeting. In effect, we will be focusing on the "high nails" of the reform program and organizing ourselves to see that these key elements are achieved.

I've attached a schedule for the retreat. Note that our retreat work will begin at dinner on Wednesday evening at the Stouffer Hotel and conclude prior to dinner on Thursday. We will spend Thursday evening as dinner guests of TSSAA. (We can thank TSSAA for helping with the expenses of the retreat.)

* * * *

SBE RETREAT
July 24-25, 1991

* * * *

SCHEDULE:

Thurs., July 25, 1991	8:00 a.m.	Depart Stouffer for Shadowbrook (approx.) 30 minute travel time.

* * * *

5:45 p.m.	Meet TSSAA officials.
6:00 p.m.	Dinner.

* * * *

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton /s/ C. Brent Poulton
Executive Director

DATE: March 13, 1992

RE: NOTES FOR THE MARCH 27, 1992 BOARD MEETING

* * * *

V. Other Items

A. Consideration of Current Rules and Regulations of the Tennessee Secondary Schools Athletic Association

Each year we ask the Tennessee Secondary Schools Athletic Association (TSSAA) to present their rules and regulations for blanket approval by the State Board of Education. This is somewhat ceremonial, though important as a means of reminding the world that TSSAA works as an agent on behalf of the State Board of Education. We have asked Bob Baldridge to characterize changes in regulations which have occurred over the past year, and also to identify issues regarding athletics which the TSSAA is currently concerned.

* * * *

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton /s/ Brent

DATE: March 20, 1992

RE: Additional Materials for March 27, 1992 Board Agenda

Enclosed are the following additional materials for the March 27, 1992, Board agenda which I indicated in my previous notes would be sent to you at this time:

1. Draft of School Board Training Academy Plan
2. Draft of Tennessee Executive Development Program Plan
3. TSSAA Rules and Regulations
4. Executive Summary of Amended Adult Education State Plan

Please put these with your other agenda materials to bring to the meeting.

CB:KN:lv
Enclosure
cc: SBE Staff

SBE Attachment V.A.

Item V.A.: Current Rules and Regulations of the Tennessee Secondary School Athletic Association

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Background:

Rule 0520-1-2-.08 of the revised Rules, Regulations and Minimum Standards of the State Board of Education recognizes and designates the Tennessee Secondary School Athletic Association (TSSAA) as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis. The State Board of Education also annually approves the current TSSAA rules and regulations.

A TSSAA staff member will present the rules and regulations and address any questions regarding TSSAA activities.

Recommendation:

The staff of the State Board of Education recommends the approval of the current TSSAA rules and regulations.

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: Members, State Board of Education

FROM: C. Brent Poulton /s/ C. Brent Poulton
Executive Director

DATE: May 12, 1993

RE: Notes for May 21, 1993 Board Meeting

* * * *

III.B. TSSAA Rules and Regulations

Competitive athletics is a big part of the high school experience. The Tennessee Secondary School Athletic Association (TSSAA) manages these activities as sanctioned by the State Board of Education. This annual report keeps members informed of issues and changes in TSSAA policies.

* * * *

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: State Board of Education Members

FROM: C. Brent Poulton /s/ C. Brent Poulton/pc
Executive Director

DATE: February 3, 1995

RE: Notes for the Upcoming SBE Meeting – February 14-15, 1995

* * * *

IV.G. TSSAA Designation

We need to modify the language of our regulations pertaining to the relationship of the State Board of Education and the TSSAA. Our current regulation implies that the State Board of Education adopts the regulations of the TSSAA as State Board rules. In fact, TSSAA is an independent entity which creates its own rules. The proposed change in our regulation states properly the relationship of the two organizations.

* * * *

State Board of Education
February 15, 1995

Agenda
Other Item IV.G.

Tennessee Secondary School Athletic Association Designation

The Background:

The Tennessee Secondary School Athletic Association (TSSAA) is a not for profit corporation whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." State Board of Education rules designate the TSSAA as the authority to supervise interscholastic athletics among public schools.

Current Board rules call for the Board to annually approve the rules and regulations in the official TSSAA handbook. Some confusion has arisen regarding characterizing TSSAA's internal rules as rules promulgated by the State Board of Education under its statutory authority.

The Proposal:

To clarify the nature of the relationship between the TSSAA, a private entity, and the State Board of Education, changes are proposed in the language of the Board's rules on interscholastic athletics.

The Recommendation:

The SBE staff recommends adoption of the proposed rule.

Proposed Revision: February 15, 1995

Proposed Rule Revision:

Rule 0520-1-2-.08 is amended by deleting in its entirety and replacing it with the following rule:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1050
615-741-2966

MEMORANDUM

TO: State Board of Education Members

FROM: C. Brent Poulton, Executive Director
/s/ CBP

DATE: April 6, 1995

RE: Notes for the Upcoming SBE Meeting – April 18-19, 1995

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III. Rule Revisions

* * * *

E. TSSAA Designation

This is the same proposition that was included in last month's agenda. Our interest is in making our rules consistent with the reality of TSSAA being an independent, self-governed corporation. Our present rule leaves room for the impression that the State Board of Education has authority to modify TSSAA regulations, which is not the case. We're anxious to make this modification to avoid unnecessary involvement in TSSAA disputes.

State Board of Education **Agenda**
April 19, 1995 **Rule Revisions Item IV.E.**

Tennessee Secondary School Athletic Association Designation

The Background:

The Tennessee Secondary School Athletic Association (TSSAA) is a not for profit corporation whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." State Board of Education rules designate the TSSAA as the authority to supervise interscholastic athletics among public schools. Current board rules also call for annual approval of the rules and regulations in the official TSSAA handbook.

The Proposal:

Due to the nature of the relationship between the TSSAA, a private entity, and the State Board of Education, changes are proposed in the language of the Board's rules on interscholastic athletics. Some confusion has arisen regarding characterizing TSSAA's internal rules as rules promulgated by the State Board of Education under its statutory authority.

The Recommendation:

The SBE staff recommends adoption of the proposed rule.

Proposed Rule Revision: April 19, 1995

RULE REVISION:

Rule 0520-1-2-.08 is amended by deleting in its entirety and replacing it with the following rule:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

MINUTES
STATE BOARD OF EDUCATION
STATE BOARD OF VOCATIONAL EDUATION
MONTHLY MEETING
AUGUST 24, 1984

* * * *

ITEM

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XXII TENNESSEE STATE SCHOOL ATHLETICS ASSOCIATION (TSSAA)

Mr. Gill GIDEON briefed the Board regarding the goals, purposes and procedures of the TSSAA. In response to SWAIN's question, GIDEON noted that [sic] soccer is not currently sanctioned by the TSSAA, but with the growing popularity of the sport, it is likely to be sanctioned in the near future.

* * * *

MINUTES
STATE BOARD OF EDUCATION
MAY 27, 1988

MEETING CALLED TO ORDER

The State Board of Education met in Room C1-124 of the Cordell Hull Bldg., Nashville, Tennessee, on May 27, 1988. Chairman Nelson ANDREWS called the meeting to order at 9:00 a.m.

* * * *

III. OTHER ITEMS

* * * *

H. REVIEW OF TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION RULES

Chuck CAGLE, SBE staff member, reviewed the status of Tennessee Secondary Schools Athletic Association, (TSSAA) with regard to Board rules. In 1984 the Board delegated to TSSAA the authority to promulgate rules relative to secondary school athletic events. That action called for a periodic review and approval of the operational authority delegated to TSSAA. The staff of the State Board of Education conducted the review and recommended that the TSSAA rules be approved and the TSSAA be designated to continue as the agency to govern secondary athletics for the Board.

ACTION: KEMP moved approval of the review of TSSAA rules and the continued designation of the TSSAA to govern athletics in Tennessee secondary schools. BOND seconded. ROLL CALL VOTE. MOTION PASSED UNANIMOUSLY.

* * * *

MINUTES
STATE BOARD OF EDUCATION
MAY 31, 1991

MEETING CALLED TO ORDER

The State Board of Education met in the offices of the State Board of Education; Nashville, Tennessee, on May 31, 1991. Chairman Nelson Andrews convened the meeting at 8 a.m.

* * * *

IV. CAREER LADDER AND OTHER ITEMS

* * * *

D. Consideration of Current Rules and Regulations of the Tennessee Secondary School Athletic Association

Bob BALDRIDGE, Associate Director of the Tennessee Secondary School Athletic Association, made a presentation on the current status of participation in secondary school athletic programs. He noted that over 90,000 students in grades 9-12 participate. Of those participating, 1/3 are girls and 2/3 are boys. In addition, a large number of students at the seventh and eighth grade level participate in middle school and junior high programs which are not directly regulated by TSSAA. The TSSAA organization has a budget of approximately $1 million and 330 high schools as members. He noted the advantages of TSSAA membership to schools in providing catastrophic insurance at a group rate which is more affordable than each individual school obtaining a policy.

BALDRIDGE noted that the main functions of TSSAA are in providing officials, setting the expectations for control of athletic events, and determining eligibility of student athletes. TSSAA rules also require that schools be in session in order for their students to participate in athletic events. This requirement has served as an incentive for many communities to finalize local school system budgets and to begin school in a timely fashion each fall.

Bob BYRD, SBE member, inquired about the procedures used by TSSAA in determining the site for state championship events in football and basketball. Bob BALDRIDGE reviewed the process used in determining the preference of member schools for the location of the state tournament events.

ACTION: Dick RAY moved approval of the current rules for TSSAA. Cynthia BOND seconded. ROLL CALL VOTE. MOTION PASSED UNANIMOUSLY.

* * * *

STATE BOARD OF EDUCATION UPDATE

State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1030
(615) 741-2966
Nelson Andrews, Chairman
C. Brent Poulton, Exec. Director

The State Board of Education met on Friday, May 31, 1991. If you have any questions or would like to request copies of agenda items or reports approved by the Board, please call the State Board of Education office at (615) 741-2966.

* * * *

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION. The Board approved the current rules and regulations of the Tennessee Secondary School Athletic Association. TSSAA officials also provided the Board with a report on current levels of participation by students in interscholastic athletic programs and areas of continuing activity and concern for secondary athletic programs within the state.

* * * *

FOR IMMEDIATE RELEASE

Contract:
Ken Nye
State Board of Education
(615) 741-2966

State of Tennessee
State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1030
615-741-2966

STATE BOARD OF EDUCATION MEETS

NASHVILLE, Tennessee – The State Board of Education will convene for a regular meeting on Friday, March 27, 1992.

* * * *

The State Board of Education will also receive other reports and consider additional items at the meeting which will include: (1) new licensure standards for principals, (2) the annual plans for the School Board Training Academy for local school board members and the Tennessee Executive Development Program for superintendents, (3) the annual report on teacher candidate test results, (4) the rules and regulations of the Tennessee Secondary School Athletic Association, and (5) the six-year program plan for Adult Basic Education in Tennessee.

MINUTES
State Board of Education
March 27, 1992

MEETING CALLED TO ORDER

The State Board of Education met in the offices of the State Board of Education, Nashville, Tennessee, on March 27, 1992. Chairman Nelson Andrews convened the meeting at 8:00 a.m.

* * * *

V. OTHER ITEMS

A. Consideration of Current Rules and Regulations of the Tennessee Secondary Schools Athletic Association

Bob BALDRIDGE, Associate Executive Director for the Tennessee Secondary Schools Athletic Association (TSSAA), provided a report to the Board and reviewed the current status of the TSSAA Rules and Regulations. The current areas of activity and issues involved in secondary school athletic programs include the interest of middle schools in being regulated by TSSAA, the proposal by some public schools for separate state tournaments for private schools, the "red-shirting" of students during the middle grades, the resident requirement of students with divorced parents who reside in different school zones or districts, and the classification of schools. BALDRIDGE concluded his report by inviting board members to attend any TSSAA sponsored events or tournaments. He noted the high

attendance at the recent state basketball tournaments for both girls and boys teams.

ACTION: Dick RAY moved approval of the rules and regulations of the Tennessee Secondary Schools Athletic Association. Bill SWAIN seconded. ROLL CALL VOTE. MOTION PASSED UNANIMOUSLY.

Adjourned: 11:00

* * * *

STATE BOARD OF EDUCATION UPDATE

State Board of Education
400 Deaderick Street
Suite 200, Citizens Plaza
Nashville, Tennessee 37243-1030
(615) 741-2966
Nelson Andrews, Chairman
C. Brent Poulton, Exec. Director

The State Board of Education met on Friday, March 27, 1992. If you have any questions or would like to request copies of agenda items or reports approved by the Board, please call the State Board of Education office at (615) 741-2966.

* * * *

CURRENT RULES AND REGULATIONS OF THE TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION. The Board approved the current rules and regulations of the Tennessee Secondary Schools Athletic Association. TSSAA officials also provided the State Board of Education with a report on current areas of activity and issues involved in secondary school athletic programs in Tennessee. These areas include the interest of middle schools in being regulated by TSSAA, the proposal from some public schools for separate state tournaments for private schools, the "red-shirting" of students during the middle grades, the resident requirement for students with divorced parents who reside in different school zones or districts, and the classification of schools.

* * * *

MINUTES
State Board of Education
July 29, 1994

MEETING CALLED TO ORDER

The State Board of Education met on July 29, 1994 in Nashville, Tennessee, in the offices of the State Board of Education.

* * * *

VI. Other Items

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h. Remarks by Ronnie Carter, TSSAA

Brent Poulton, SBE Executive Director, said the Board invited Ronnie Carter, Executive Director of the Tennessee Secondary Schools Athletic Association (TSSAA) to comment on its lack of minority hiring on the TSSAA staff.

Ronnie Carter reviewed the history of the TSSAA organization. He said the organization currently employs four administrative staff and six support staff. The organization is controlled by a nine member board representing the member schools. Two of the TSSAA Board members are minority individuals. Overall, the association annually deals with budget limitations which restrict hiring opportunities, along with a history of limited turnover in positions. In January of this year, the TSSAA Board took action to look at the employment of an additional staff position and indicated that the position should be filled with a minority individual.

Carter noted that 67% of TSSAA's budget is composed of receipts from the state football playoffs and the state basketball tournaments. The receipts from both these major events are annually affected by weather. He also noted that the recent interest of middle schools in developing a more formal relationship with TSSAA had led to an affiliate relationship with middle school athletic association for those schools who are concerned with rules, liability, and the proliferation of locally sponsored middle school tournaments. This interest by Middle Schools in becoming TSSAA members is an area where the expansion of staff will likely occur.

Board member Byrd comments on the Board's overall concern that TSSAA reflect hiring practices which are the same as those expected for local schools.

Chairman Ray requested Carter to provide the Board with an update at the Board's September Board meeting as to the progress being made by TSSAA in resolving this issue.

Board member Beasley asked about the current activities of middle schools. She expressed her concern that middle school programs should be devoted to the participation of all students in intramurals and less concerned with competitive athletics.

The Board adjourned and then reconvened in a meeting of the Board of Directors for the Tennessee Volunteer Public Education Trust Fund Foundation.

* * * *

MINUTES
STATE BOARD OF EDUCATION
SEPTEMBER 29, 1994

MEETING CALLED TO ORDER:

The State Board of Education met in the small assembly room for the city/county building in Knoxville, Tennessee on September 29, 1994.

* * * *

VII. Other Items

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d. Remarks from TSSAA

Bob Baldridge, associate executive director for TSSAA, updated the Board on TSSAA's employment practices. He noted the association's ongoing difficulties in maintaining sufficient revenues which would allow the organization to expand its current number of staff positions such that, pending any staff turnover, minority candidates could be considered for vacant staff positions.

Hosea Hill from Memphis, Tennessee spoke about TSSAA's hiring practices. He provided the Board with a number of documents and discussed the history of the questions raised with regard to the employment of minority individuals by TSSAA.

Bob Byrd, SBE member, indicated his ongoing concern that TSSAA rectify this situation. He noted the assurances provided to the Board at both this and the July meeting that the problem would be resolved within the next year or two as sufficient funding is obtained by the organization.

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MINUTES
STATE BOARD OF EDUCATION
MARCH 14, 1995

MEETING CALLED TO ORDER

The State Board of Education met in its offices on March 14, 1995.

III.e. TSSAA Designation

Patrick Smith, SBE staff, presented the item for information and said item should be deferred for action until the Board's April meeting.

* * * *

State Board of Education
March 14, 1995

Agenda
Other Item III.E.

Tennessee Secondary School Athletic Association Designation

The Background:

The Tennessee Secondary School Athletic Association (TSSAA) is a not for profit corporation whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." State Board of Education rules designate the TSSAA as the authority to supervise interscholastic athletics among public schools. Current board rules also call for annual approval of the rules and regulations in the official TSSAA handbook.

The Proposal:

Due to the nature of the relationship between the TSSAA, a private entity, and the State Board of Education, changes are proposed in the language of the Board's rules on interscholastic athletics. Some confusion has arisen regarding characterizing TSSAA's internal rules as rules promulgated by the State Board of Education under its statutory authority.

The Recommendation:

The SBE staff recommends adoption of the proposed rule.

Proposed Revision: March 14, 1995

PROPOSED RULE REVISION:

Rule 0520-1-2-.08 is amended by deleting it in its entirety and replacing it with the following rule:

The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

MINUTES
STATE BOARD OF EDUCATION
APRIL 19, 1995

The State Board of Education met in its offices on April 19, 1995.

* * * *

IV.E. TSSAA Designation

Patrick Smith, SBA staff attorney, presented the recommendation for a rule revision to clarify the Board's relationship with the Tennessee Secondary Schools Athletic Association (TSSAA).

Minnie Bommer, SBE member, asked if TSSAA membership is voluntary.

Brent Poulton, SBE executive director, said the current rule implies that the Board can change TSSAA rules when in fact the Board does not have that authority. The recommended revision would reflect the reality of the Board's authority regarding the operations of TSSAA.

Smith said in recent court decisions the state does carry liability and that this revision would make clear the relationship of the Board to TSSAA.

Bommer asked if the Board needs to work further to define its relationship with TSSAA.

Poulton said the Board's relationship to TSSAA would be reviewed by Board staff during the coming year.

ACTION: Bob Byrd moved approval of the rule revision. Fielding Rolston seconded. Roll call vote. Motion passed with one no and one abstention.

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State Board of Education
April 19, 1995

Agenda
Other Item IV.E.

Tennessee Secondary School Athletic Association Designation

The Background:

The Tennessee Secondary School Athletic Association (TSSAA) is a not for profit corporation whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." State Board of Education rules designate the TSSAA as the authority to supervise interscholastic athletics among public schools. Current board rules also call for annual approval of the rules and regulations in the official TSSAA handbook.

The Proposal:

Due to the nature of the relationship between the TSSAA, a private entity, and the State Board of Education, changes are proposed in the language of the Board's rules on interscholastic athletics. Some confusion has arisen regarding characterizing TSSAA's internal rules as rules promulgated by the State Board of Education under its statutory authority.

The Recommendation:

The SBE staff recommends adoption of the proposed rule.

Proposed Revision: April 19, 1995

RULE REVISION:

Rule 0520-1-2-.08 is amended by deleting it in its entirety and replacing it with the following rule:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
Hermitage, Tennessee
January 11, 1990

* * * *

ATTENDANCE RECORD

The TSSAA Board of Control met at TSSAA building on January 11, 1990. The session was called to order by Chairman Hardy Loyd at 10:00 a.m. The following members of the Board of Control were present: Hardy Loyd, Tom Fann, Norman Dillon, Emmitt Simon, Mike Reed, A. D. Hancock, Jim Poteete, Jimmy Ellis, and Clint Abbott. Mr. Bill Stanfield, Chairman of the Legislative Council, and Mr. Chuck Cagle of the State Board of Education were also present. The state office was represented by Ronnie Carter, Bob Baldridge, and Gene Beck.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
March 22, 1990
Murfreesboro, Tennessee

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ATTENDANCE RECORD

The TSSAA Board of Control met at the Garden Plaza Hotel in Murfreesboro on March 22, 1990. The session was called to order by Chairman Hardy Loyd at 8:00 a.m. The following members of the Board of Control were present: Hardy Loyd, Norman Dillon, Emmitt Simon, Jimmy Ellis, A. D. Hancock, Jim Poteeete, Clint Abbott, Mike Reed, and Johnny Williams. Mr. Bill Stanfield, Chairman of the Legislative Council; Mr. Chuck Cagle of the State Board of Education, and Mr. Dan Tollett of the State School Boards Association were also present. The state office was represented by Ronnie Carter, Bob Baldridge, and Gene Beck.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
June 8-9, 1991
Pigeon Forge, Tennessee

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ATTENDANCE RECORD

The TSSAA Board of Control met in Pigeon Forge, Tennessee on June 8 - 9, 1991. The meeting was called to order by President A. D. Hancock at 2:00 p.m. The following members of the Board of Control were present: Mr. Mike Reed, Mr. Clint Abbott, Mr. Norman Dillon, Mr. Jimmy Ellis, Mr. A. D. Hancock, Mr. Gene Trotter, Mr. Jim Poteete, Mr. Johnny Williams and Mr. Emmitt Simon. Also in attendance were Mr. Gordon Perry, Chairman of the Legislative Council; Mr. Chuck Cagle of the State Board of Education and Mr. Jim Cartwright of the Tennessee Athletic Coaches' Association. The state office was represented by Ronnie Carter, Bob Baldridge and Gene Beck.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
Murfreesboro, Tennessee
March 19, 1992

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ATTENDANCE RECORD

The TSSAA Board of Control met at the Garden Plaza Hotel in Murfreesboro, Tennessee on March 19, 1992. The session was called order at 8:00 a.m. The following members of the Board of Control were present: Mike Reed, Clint Abbott, John Dixon, Morris Rogers, A. D. Hancock, Gene Trotter, Johnny Williams, John Sammons, and Harry Durham. Also present were ex officio members Gordon Perry, President of the Legislative Council; Chuck Cagle, representing the Tennessee School Boards Association; Kimberly Whaley, representing the State Board of Education; and Jim Cartwright, representing the Tennessee Athletic Coaches Association.

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MINUTES OF THE BOARD OF CONTROL

Knoxville, Tennessee
Tennessee Secondary School Athletic Association
June 19, 1992

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ATTENDANCE RECORD

The TSSAA Board of Control met at the Hyatt Regency in Knoxville, Tennessee on June 19, 1992. The session was called to order at 9:00 a.m. The following members of the Board of Control were present: Mike Reed, Clint Abbott, John Dixon, Morris Rogers, A. D. Hancock, Gene Trotter, Johnny Williams, John Sammons, and Harry Durham. Also present were Gordon Perry, President of the Legislative Council, Chuck Cagle of the Tennessee School Boards Association, Kimberly Whaley of the State Board of Education, and members of our staff.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
August 29, 1992
Hermitage, Tennessee

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ATTENDANCE RECORD

The TSSAA Board of Control met at the TSSAA Building in Hermitage, Tennessee on August 29, 1992. The session was called to order at 9:00 a.m. The following: Tennessee on June 19, 1992. The session was called to order at 9:00 a.m. The following members of the Board of Control were present: Mike Reed, Clint Abbott, John Dixon, Morris Rogers, Gene Trotter, Johnny Williams, John Sammons, and Harry Durham. Also present were Gordon Perry, President of the Legislative Council, Chuck Cagle of the Tennessee School Boards Association, Kimberly Whaley of the State Board of Education, and Jim Cartwright of the TACA, and members of our staff.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
November 4, 1992
Hermitage, Tennessee

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ATTENDANCE RECORD

The TSSAA Board of Control met at the TSSAA Building on November 4, 1992. The meeting was called to order by Clint Abbott, Chairman, at 9:00 a.m. The following members of the Board of Control were present: Mike Reed, Clint Abbott, John Dixon, Morris Rogers, Gene Trotter, Johnny Williams, and John Sammons. Also present were Chuck Cagle, Tennessee School Boards Association; Ernestine McWherter, Tennessee Organization of School Superintendents; Kimberly Whaley, State Board of Education; Jim Cartwright, Tennessee Athletic Coaches Association; Gordon Perry, President of the Legislative Council; and members of our staff.

* * * *

MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
November 29-30, 1992
Hermitage, Tennessee

* * * *

ATTENDANCE RECORD

The TSSAA Board of Control met at the TSSAA Building on Sunday night, November 29, 1992, at 7:00 p.m. The meeting was called to order by Clint Abbott, Chairman. The following members of the Board of Control were present: Mike Reed, John Dixon, Morris Rogers, Gene Trotter, Dick Seay, Harry Durham, Johnny Williams, and John Sammons. Also in attendance were Chuck Cagle, Tennessee School Boards Association; Kimberly Whaley, State Board of Education; Ernestine McWherter, Tennessee Organization of School Superintendents; Jim Cartwright, Tennessee Athletic Coaches Association; Gordon Perry, President of the Legislative Council; and members of the TSSAA staff.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
January 14, 1993
Hermitage, Tennessee

* * * *

ATTENDANCE RECORD

The TSSAA Board of Control met at the TSSAA Building on January 14, 1993. The meeting was called to order by President Clint Abbott, Chairman, at 10:00 a.m. The following members of the Board of Control were present: Clint Abbott, Mike Reed, John Dixon, Morris Rogers, Gene Trotter, Johnny Williams, John Sammons, Harry Durham, and Dick Seay. Also in attendance were Gordon Perry, President of the Legislative Council; Chuck Cagle, Tennessee School Boards Association; Kimberly Whaley, State Board of Education; Jim Cartwright, Tennessee Athletic Coaches Association; and Gene Steve Hammond, Tennessee Association of Independent Schools. Members of the state office staff present were: Ronnie Carter, Bob Baldridge, Gene Beck, and Gene Menees.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
Hermitage, Tennessee
March 18, 1993

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ATTENDANCE RECORD

The TSSAA Board of Control met at the Garden Plaza Hotel in Murfreesboro, Tennessee on March 18, 1993. The session was called to order at 8:00 a.m. The following members of the Board of Control were present: Mike Reed, Clint Abbott, John Dixon, Morris Rogers, Richard Seay, Gene Trotter, Jim Poteete, John Sammons, and Harry Durham. Also present were Gordon Perry, President of the Legislative Council; Chuck Cagle, representing the Tennessee School Board Association; Dr. Brent Poulton, representing the State Board of Education; and Steve Hammond, representing the Tennessee Association of Independent Schools. In addition, Jim Phifer, Billy Joe Evans, Pete Stafford, David Daniels, and George Williams, members of the Legislative Council, were present.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
Hermitage, Tennessee
June 30, 1993

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ATTENDANCE RECORD

The Board of Control met at the TSSAA Building in Hermitage, Tennessee on June 30, 1993. The session was called to order at 10:00 a.m. The following members of the Board of Control were present: Mike Reed, Clint Abbott, John Dixon, Morris Rogers, Gene Trotter, John Sammons, and Harry Durham. Also present were Gordon Perry, President of the Legislative Council; Chuck Cagle, representing the Tennessee School Board Association; and Patrick Smith, representing the State Board of Education. Also present from the state office staff were Gene Beck, Gene Menees, Bob Baldridge, and Ronnie Carter.

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MINUTES OF THE BOARD OF CONTROL

Hermitage, Tennessee
Tennessee Secondary School Athletic Association
August 28, 1993

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ATTENDANCE RECORD

The TSSAA Board of Control met at the TSSAA Building in Hermitage, Tennessee on August 28, 1993. The session was called to order at 9:00 a.m. The following members of the Board of Control were present: Clint Abbott, President, John Dixon, Harry Durham, Jim Poteete, Mike Reed, Morris Rogers, and Gene Trotter. Also present were Gordon Perry, President of the Legislative Council; Chuck Cagle of the Tennessee School Boards Association; and Patrick Smith of the State Board of Education; Jim Cartwright of the TACA; and Steve Hammond, representing the Tennessee Association of Independent Schools. Present from the TSSAA staff were Ronnie Carter, Bob Baldridge, Gene Beck, Gene Menees, and Wanda Belt.

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MINUTES OF THE BOARD OF CONTROL

Tennessee Secondary School Athletic Association
November 3, 1993
Hermitage, Tennessee

* * * *

ATTENDANCE RECORD

The TSSAA Board of Control met at the TSSAA Building on November 3, 1993. The meeting was called to order by Clint Abbott, Chairman, at 9:00 a.m. The following members of the Board of Control were present: Clint Abbott, John Dixon, Harry Durham, Jim Poteete, Mike Reed, Morris Rogers, and Gene Trotter. Also present were Gordon Perry, President of the Legislative Council; Chuck Cagle, Tennessee School Boards Association; Ernestine McWherter, Tennessee Organization of School Superintendents; Patrick Smith, State Board of Education; Jim Cartwright, Tennessee Athletic Coaches Association; Steve Hammond, Tennessee Association of Independent Schools; Scott Brunette, Athletic Director, Metropolitan-Nashville Public Schools; and Ronnie Carter, Bob Baldridge, Gene Beck, Gene Menees, and Wanda Belt of the TSSAA staff.

* * * *

MINUTES OF BOARD OF CONTROL MEETING

Henry Horton State Park
June 18–19, 1996

* * * *

ATTENDANCE RECORD

The Board of Control met at Henry Horton State Park on June 18-19, 1996. The session was called to order at 8:00 a.m. on June 18 and reconvened at 8:00 a.m. on June 19. The following members of the Board of Control were present: Mike Reed, President, James Armstrong, Lynn Brown, John Dixon, Mckey Dunn, Harry Durham, Fred Kessler, Sam Miles, and Morris Rogers. Also present were Gordon Perry, president of the Legislative Council; Scott Brunette, Tennessee High School Athletic Administrators Association; Steve Hammond, Tennessee Association of Independent Schools; Ernestine McWherter, Tennessee Organization of School Superintendents; Patrick Smith, Tennessee School Boards Association; and J.V. Sailors, State Board of Education. Members of the state office staff present were Ronnie Carter, Bob Baldridge, Gene Beck, Gene Menees, Bernard Childress, and Wanda Belt.

MINUTES OF THE BOARD OF CONTROL

Falls Creek Falls State Park
June 11–12, 1997

* * * *

ATTENDANCE RECORD

The Board of Control met at Fall Creek State Park on June 11-12, 1997. The session was called to order at 8:00 a.m. on June 11 and reconvened at 8:00 a.m. on June 23. The following members of the Board of Control were present: Mike Reed, President, Harry Durham, Vice President, Lynn Brown, John Dixon, Mickey Dunn, Mike Hammond, Fred Kessler, Sam Miles, and Morris Rogers. Also present were Gordon Perry, President of the Legislative Council; Scott Brunette, Tennessee High School Athletic Administrators Association; James Swain, State Department of Education; J.V. Sailors, State Board of Education; Patrick Smith, Tennessee School Boards Association; Gary Nixon, State Board of Education. Members of the state office staff present were Ronnie Carter, Bob Baldridge, Gene Beck, Bernard Childress, Larry Taft, Trina Melton and Wanda Belt.

MINUTES OF THE LEGISLATIVE COUNCIL

Tennessee Secondary School Athletic Association
March 23, 1990
Murfreesboro, Tennessee

* * * *

ATTENDANCE

The TSSAA Legislative Council met at the Garden Plaza Hotel in Murfreesboro on March 23, 1990. The session was called to order by Chairman William Stanfield at 8:00 a.m. The following members of the Legislative Council were present: William Stanfield, Raybon Moore, Jim Phifer, George Williams, Billy Joe Evans, John Dixon, Gordon Perry, Kenneth Jackson, Pete Stafford. Mr. Hardy Loyd, Chairman of the Board of Control, and Mr. Chuck Cagle of the State Board of Education were also present. The state office was represented by Ronnie Carter, Bob Baldridge, and Gene Beck.

* * * *

MINUTES OF THE LEGISLATIVE COUNCIL

Tennessee Secondary School Athletic Association
March 22, 1991
Murfreesboro, Tennessee

* * * *

ATTENDANCE

The TSSAA Legislative Council met at the Garden Plaza Hotel in Murfreesboro on March 22, 1991. The session was called to order by Vice Chairman Jim Phifer. The following members of the Legislative Council were present: John Dixon, Billy Joe Evans, Kenneth Jackson, Raybon Moore, Jim Neely, Pete Stafford and George Williams. Also in attendance representing the State Board of Education was Mr. Chuck Cagle. Representing the Board of Control were Jim Poteete, Mike Reed, Clint Abbott, Norman Dillon, Jimmy Ellis, Johnny Williams and Emmitt Simon.

* * * *

MINUTES OF THE LEGISLATIVE COUNCIL

Tennessee Secondary School Athletic Association
March 20, 1992
Murfreesboro, Tennessee

* * * *

ATTENDANCE

The TSSAA Legislative Council met at the Garden Plaza Hotel in Murfreesboro on March 20, 1992. Members of the Legislative Council present were: John Dixon, Pete Stafford, Jim Phifer, Billy Joe Evans, Jim Neely, Kenneth Jackson, Raybon Moore, Gordon Perry and George Williams. Also present were A.D. Hancock, President of the Board of Control . . . Kimberly Whaley, State Board of Education; and Jim Cartwright, Tennessee Athletic Coaches Association. Members of the staff were also present.

* * * *

MINUTES OF THE LEGISLATIVE COUNCIL

Tennessee Secondary School Athletic Association
May 8, 1992
Hermitage, Tennessee

* * * *

ATTENDANCE

The TSSAA Legislative Council met at the TSSAA Building in Hermitage, Tennessee on May 8, 1992. Members of the Legislative Council present were: John Dixon, Pete Stafford, Jim Phifer, Billy Joe Evans, Kenneth Jackson, Gordon Perry, Raybon Moore, and George Williams. Also present were A. D. Hancock, President of the Board of Control . . . Kimberly Whaley, State Board of Education. Ronnie Carter, Bob Baldridge, Gene Beck, and Gene Menees of the TSAA staff were also present.

* * * *

MINUTES OF THE LEGISLATIVE COUNCIL

Tennessee Secondary School Athletic Association
December 9, 1992
Hermitage, Tennessee

* * * *

ATTENDANCE

The TSSAA Legislative Council met at the TSSAA Building in Hermitage, Tennessee on December 9, 1992. Members of the Legislative Council present were: John Dixon, Pete Stafford, Jim Phifer, Billy Joe Evans, Kenneth Jackson, Gordon Perry, Raybon Moore, and George Williams. Also present were . . . Kimberly Whaley, State Board of Education; Chuck Cagle, Tennessee School Boards Association. Ronnie Carter, Bob Baldridge, Gene Beck, and Gene Menees of the TSSAA staff were also present.

* * * *

MINUTES OF THE LEGISLATIVE COUNCIL

Tennessee Secondary School Athletic Association
March 19, 1993
Murfreesboro, Tennessee

* * * *

ATTENDANCE

The TSSAA Legislative Council met at the Garden Plaza Hotel in Murfreesboro, Tennessee on March 19, 1993. Members of the Legislative Council present were: John Dixon, Pete Stafford, Jim Phifer, Billy Joe Evans, Jim Neely, David Daniel, Raybon Moore, Gordon Perry, and George Williams. Also present were . . . Chuck Cagle, Tennessee School Board Association; and Dr. Brent Poulton, State Board of Education. Board of Control members who were present were: Mike Reed, John Dixon, Morris Rogers, Dick Seay, Jim Poteete, John Sammons, and Harry Durham.

* * * *

MINUTES OF THE LEGISLATIVE COUNCIL

Tennessee Secondary School Athletic Association
December 5, 1996
Nashville, Tennessee

* * * *

ATTENDANCE

The TSSAA Legislative Council met at Baptist Hospital in Nashville, Tennessee on December 5, 1996. Members of the Legislative Council present were: Gordon Perry, President, David Daniel, John Dixon, Billy Joe Evans, Ed Foster, Sonny Hicks, Jean Litterer, Pete Stafford, and Steve Wilkinson. Also present were . . . Gary Nixon, State Board of Education; and James Swain, State Department of Education. Ronnie Carter, Bob Baldridge, Gene Beck, Gene Menees, Bernard Childress, and Wanda Belt were present from the TSSAA staff.

* * * *

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

* * * *

EX OFFICIO MEMBERS OF BOARD OF CONTROL AND LEGISLATIVE COUNCIL

State Board of Education	Gary Nixon/J.V. Sailor
State Department of Education	Jim Swain/Jane Walters
TN School Boards Association	George Nerren/ Patrick Smith
TN Organization of School Superintendents	Ernestine McWherter
TN Athletic Coaches Association	Jim Cartwright
TN Association of Independent Schools	Barbara Dausch
TN High School Athletic Administrators Association	Scott Brunette

* * * *

Last Modified February 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR TITLE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 3-97-1249**
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	**Judge Campbell**
	)	**Magistrate Judge**
	)	**Haynes**
	)	
	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF RONNIE CARTER

Ronnie Carter, being first duly sworn, upon his oath deposes and says:

1. My name is Ronnie Carter and I reside at 1544 McMahon Hollow Road, Pleasantview, Tennessee. I am the Executive Director of the Tennessee Secondary School Athletic Association ("TSSAA") and have served in this capacity since 1986. I am elected by the members of the Board of Control of TSSAA for a term of three years and my duties are set forth in Article V of the Constitution of TSSAA.

2. Attached is a compilation which I have made of the history of the TSSAA Recruiting Rule, contained in

the Constitution and By Laws of the TSSAA, as set forth in the TSSAA's handbook. The guidelines for interpreting the Recruiting Rule were developed and promulgated by the Legislative Council in 1992. The Committee which drafted the guidelines included Jim Phifer, Principal of Notre Dame School, a parochial school in Chattanooga.

3. The revenues of TSSAA are derived from State tournaments and championship playoffs. TSSAA receives no funds from any regular season interscholastic contests between member schools, regardless of the sport or the location of the event. During the 1997-98 school year, the membership dues paid to TSSAA by its member schools, whether public, private or parochial, amounted to approximately $70,000.00. During the same period, TSSAA received from total revenues of 1.6 million dollars, the majority of which come from gate receipts of tournaments and playoffs.

4. I have prepared a tabulation of the sites of post-season play off and tournament events for sports which TSSAA sanctions, golf, soccer, volleyball, cross-country, football, basketball, wrestling, baseball, softball, tennis and track, for the school years 1995-96, 1996-97, and 1997-98. The tabulation for all of these secondary school athletic contests for the three academic years is as follows:

1995-96		
Public Sites	300	Private Sites 74
1996-97		
Public Sites	301	Private Sites 89
1997-98		
Public Sites	225	Private Sites 52

For the three year period, of the 1,071 post-season, championship and playoff events, 827 were conducted at

public facilities and 244 were held at private or parochial schools. Thus, 28 percent of the post-season tournament games were held at the facilities of private or parochial member schools. At the district and regional levels of post-season tournament and playoff competition, the member schools select their own tournament sites. TSSAA has no involvement in the selection of these sites.

5. Where TSSAA utilizes public facilities, stadiums, gyms or grounds, government owned and utilized for state tournament play or playoffs, such as the Murphy Center on the campus of Middle Tennessee State University at Murfreesboro, (where TSSAA conducts its state basketball championships) TSSAA is required to enter into a written agreement with MTSU in order to be able to use the facility. Under this Agreement, TSSAA is required to register with the Sales Tax Division of the Tennessee Department of Revenue and must pay all applicable amusement sales taxes. Also, TSSAA must furnish proof of insurance, as required by the policies of the State Board of Regents of the university and community college system of Tennessee for private used or the facilitiy. Furthermore, TSSAA must agree to indemnify and hold MTSU harmless from all liabilities arising out of the use of the Murphy Center. For the "Spring Fling", the state championship tournaments in spring sports, i.d. track etc., TSSAA takes the bids from cities wishing to host the event and the host city provides, in its bid, that the sites for the tournament event or playoff.

FURTHER AFFIANT SAITH NOT.

/s/ Ronnie Carter
Ronnie Carter

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed
before me, this 29th day of June, 1998.

/s/ Tammy S. Swann
Notary Public

My Commission Expires: 5/27/2001

[Exhibit A]

HISTORY OF THE "RECRUITING RULE"

In 1925, the Tennessee Secondary School Athletic Association was formed.

In 1935, the first recruiting rule was developed and it stated:

> "The use of undue influence by anyone in causing a student to transfer from one school to another for athletic purposes shall render the student ineligible for twelve months, and the school shall be penalized."

In 1951, the phrase . . . "or attempting to cause" was added, making the recruiting rule read:

> "The use of undue influence by anyone in causing, or attempting to cause, a student to transfer from one school to another for athletic purposes shall render the student ineligible for twelve months, and the school shall be penalized."

In 1958-59, the recruiting rule was changed to read:

> "The use of undue influence by any person connected, or not connected, with the school to secure or to retain a student or the parents or guardians of a student for athletic purposes may cause the student to become ineligible and will make the school subject to penalty."

In 1984-85, the phrase "with or without an athletic record" was added, making the rule read:

> "The use of undue influence on a student (with or without an athletic record), his parents or guardians of a student by any person connected, or not connected, with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule."

The Questions and Answers of the recruiting rule were also added:

Q. What is the penalty for violation of the recruiting rule?
A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

Q. Is it permissible for a coach or teacher to transport an athlete to or from school?
A. No. A coach or teacher who transports an athlete to or from school will cause the athlete to become ineligible and the school will be subject to penalty.

Q. Is it permissible for a coach to contact a student or his parents prior to his enrollment in the school?
A. No, a coach may not contact a student or his parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

In March of 1990, the Legislative Council made a decision regarding the rule and decided the following:

> "That a committee consisting of Bill Stanfield, Gordon Perry, Jim Phifer, and members of the TSSAA staff meet to strengthen the interpretations regarding 'undue influence' under the recruiting rule and strengthen the interpretation made in the questions and answers section regarding this area, and also to look at the entire transfer rule."

In 1990-91, two new questions were added:

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at school, meet with school officials, etc.
2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior

approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

   Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

   Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite feeder pattern.

6. A member school is prohibited from giving arty item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

Q. What is allowed by members schools in contacting prospective students?
A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

In 1992-93, the "Guidelines for Understanding the 'Recruiting Rule' and Understanding 'What's Undue Influence?'" was added. It reads:

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.
2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.
3. Students should be seen as students and not singled out based on their potential athletic ability.
4. Pre-arranged contact is seen in the same manner as initial contact.
5. Any student or family or individual that contacts a coach about attending a school where he or she should be informed that they need to contact the principal, admissions

department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year-old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	**No. 3-97-1249**
v.	)	**Judge Campbell**
	)	**Magistrate Judge Haynes**
TENNESSEE	)	
SECONDARY SCHOOLS	)	
ATHLETIC ASSOCIATION	)	
and RONNIE CARTER,	)	
Executive Director and	)	
Individually,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JEROME V. SAILORS

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Jerome V. Sailors, being first duly sworn, upon his oath deposes and says:

1. My name is Jerome V. Sailors and I am the Executive Director of the State Board of Education of the State of Tennessee and my office is located on the 9th Floor of the Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, Tennessee 37219. I was appointed as Executive Director in January 1996 and assumed my position in April 1996. Before January 1996, I served as Superintendent of the Anderson County, Tennessee School System for seven years.

2. The minutes of the State Board of Education indicate that on August 25, 1972, the State Board of Education adopted the following resolution regarding the Tennessee Secondary School Athletic Association:

RESOLUTION

"WHEREAS, the State Board of Education by deference has recognized since 1925 the functions of the Tennessee Secondary School Association in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee:

NOW, THEREFORE, BE IT RESOLVED, That the Tennessee State Board of Education recognizes and designates the Tennessee Secondary School Athletic Association as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate in on an interscholastic basis. (Junior High Schools must include grade 9 in order to qualify for membership.) The authority granted herein shall remain in effect until revoked.

BE IT FURTHER RESOLVED, That the State Board of Education approves the current rules and regulations as stated in the 1972-73 official handbook of the Tennessee Secondary School Athletic Association and reserves the right to review the appropriateness of any future changes; and

BE IT FURTHER RESOLVED, That the Chairman of the Tennessee State Board of Education shall designate a person or persons to serve in an ex-officio capacity of the Tennessee Secondary School Athletic Association Board of Control and Legislative Council".

The minutes of the State Board of Education indicate that this resolution was unanimously adopted. A copy of the minutes of the August 25, 1972 meeting are attached.

3. I am also attaching a copy of the current regulation of the State Board of Education regarding TSSAA. Rule 0520-1-2-.08 **Interscholastic Athletics** provides:

> (1) The State Board of Education recognizes the value of participating in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association."

The latest revision to this rule was filed on October 31, 1995, effective February 28, 1996. The authority of the Tennessee State Board of Education as authorized by the Tennessee General Assembly is set forth in § 49-1-301 9 et. seq. Tenn. Code Ann. At no point in § 49-1-302 is there any reference to the authority of the State Board of Education to set policies for interscholastic athletics or extra-curricular activities. Apparently, the State Board assumed the responsibility in 1972 when it first addressed this matter but, in my judgment, there is no statutory authority granted to the State Board of Education to recognize, designate, or authorize the Tennessee Secondary School Athletic Association to take any action relevant to coordinating or regulating interscholastic athletic competition in the state of Tennessee.

4. The State Board of Education does not in any way approve or disapprove or act upon any of the TSSAA rules and regulations regarding the regulation of athletic competition between member schools. TSSAA does not submit to the State Board of Education for approval of its rules and regulations nor does the State Board of Education approve, consider, or disapprove the salaries for the Executive Director, the Associate Executive Directors or the staff members of the TSSAA. As far as I know, TSSAA has the authority to purchase real property, buy and sell property, mortgage or encumber property and execute promissory notes, deeds of trust, or mortgages without any approval or consideration by the State Board of Education. Likewise, TSSAA does not submit to nor does the State Board of Education approve any budget of any type for TSSAA's operations. TSSAA does not receive any tax revenues from the State of Tennessee, the State Board of Education, or the Department of Education. Likewise, no member of the State Board of Education attends meetings either of the TSSAA Board of Control or Legislative Council. Any public high school in Tennessee is free to join or refrain from joining TSSAA.

FURTHER AFFIANT SAITH NOT.

/s/ Jerome V. Sailors
Jerome V. Sailors

Sworn to and subscribed before
me this 26th day of June, 1998.

/s/ Phyllis E. Childress

My Commission Expires: January 29, 2000

[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 3-97- 249**
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	**Judge Campbell**
	)	**Magistrate Judge**
	)	**Haynes**
	)	
	)	
Defendants.	)	

SECOND AFFIDAVIT OF RONNIE L. CARTER

Ronnie L. Carter, being first duly sworn, upon his oath deposes and says:

(1) My name is Ronnie L. Carter and I am the Executive Director of the Tennessee Secondary School Athletic Association ["TSSAA"] and I have held this position since 1986.

(2) I have examined the membership records of TSSAA and compared them with the attached list of public schools in the State of Tennessee. The following public schools in the State of Tennessee are eligible for full membership in TSSAA but are not members:

North Cleveland Horizon School	Cleveland, Tennessee

Stoney Fork School	Jacksboro, Tennessee
Carroll County Vocational Center	Huntington, Tennessee
Lift Academy Alternative School	Elizabethton, Tennessee
Boys & Girls Club Alternative Learning Center	Nashville, Tennessee
Center for Family & Life	Nashville, Tennessee
Harris-Hillman Special Education School	Nashville, Tennessee
Murphy Alternative Learning Center	Nashville, Tennessee
Hamblen County Alternative School	Nashville, Tennessee
Dawn Handicap School	Chattanooga, Tennessee
Alternative Center for Learning	Knoxville, Tennessee
Knox Adaptive Educational Center	Knoxville, Tennessee
Transition School	Knoxville, Tennessee
Fort Sanders Development Center	Knoxville, Tennessee
The Center School	Knoxville, Tennessee
Reach Academy	Livingston, Tennessee
Dry Valley School	Cookeville, Tennessee
Emory Heights Center	Harriman, Tennessee

Roane Career & Technical Center	Harriman, Tennessee
Daniel McKee Alternative School	Murfreesboro, Tennessee
Alternative Learning Center	Sevierville, Tennessee
Special Learning Center	Sevierville, Tennessee
Pyramid Academy	Memphis, Tennessee
Shrine School	Memphis, Tennessee
E. B. Wilson Night School	Hendersonville, Tennessee
Tipton County Alternative Learning School	Brighton, Tennessee
Warren County Alternative School	McMinnville, Tennessee
Weakley County Regional High School	Dresden, Tennessee

FURTHER AFFIANT SAITH NOT.

/s/ Ronnie L. Carter
Ronnie L. Carter

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed, before me, this 21st day of July, 1998.

/s/ Stacy Morefield
Notary Public

My Commission Expires: 11-25-2000

[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**NO: 3-97- 249**
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	**JUDGE CAMPBELL**
	)	**MAG. JUDGE**
	)	**HAYNES**
	)	
	)	
Defendants.	)	

SECOND AFFIDAVIT OF MELNA VAN BEBER

Melna Van Beber, first being duly sworn according to law, states as follows:

(1) I am a paralegal employed by the law firm of Bass, Berry & Sims PLC, which represents plaintiff Brentwood Academy in this matter. I have held that position since 1996.

(2) I have personal knowledge of the facts contained in this affidavit and they are true, correct and accurate to the best of my knowledge, information and belief.

(3) At the direction of attorney Lee Barfield, I have attempted to ascertain whether all of the public high schools in Tennessee are members of the TSSAA. I was unable to identify any person who could answer this question directly

or any document setting forth the answer directly. Accordingly, I obtained a comprehensive listing of all of the public schools in the state from the Tennessee Department of Education. From that list, I determined that there are 295 public high schools in the state. I then reviewed the TSSAA's current membership roster to determine how many of these 295 schools are members of the TSSAA. I ultimately determined that all 295 public high schools are members of the TSSAA.

(4) The foregoing conclusion is based upon the best evidence available to Brentwood Academy at this time, and I believe my analysis to be true and accurate.

(5) I have reviewed the Second Affidavit of Ronnie Carter, which was filed with the Court on July 22, 1998. During the course of my investigation, I contacted a number of the schools that Mr. Carter's affidavit identifies as non-TSSAA members, such as Harris-Hillman Special Education School, Weakley County Regional High School and Daniel McKee Alternative School. Those schools were not included on my list of potential TSSAA members because they do not have interscholastic sports programs.

FURTHER AFFIANT SAITH NOT.

/s/ Melna Van Beber
Melna Van Beber

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to before me this 14th day of July, 1998

/s/ Karen Reecer
Notary Public

My Commission Expires:
July 22, 2000

[Certificate of Service omitted in printing.]

ADMINISTRATIVE RULES & REGULATIONS

0520-1-2-.08 Interscholastic Athletics.

(3) The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

***Authority**: T.C.A.§ 49-1-302. **Administrative History**: Original rule certified June 10, 1974. Amendment filed February 28, 1978; effective March 30, 1978. Amendment filed January 9, 1979; effective February 23, 1979. Repeal and new rule filed March 16, 1992; effective June 29, 1992. Amendment filed October 31, 1995; effective February 28, 1996.*

0520-1-3-.05 State Curriculum, Requirement D.

(1) Curriculum Frameworks.

(a) The State Board of Education shall adopt a curriculum framework for each subject area, grades K-12. These frameworks shall contain the broad goals and objectives which identify the minimum content required at each grade level and for each course. The approved frameworks shall be the basis for planning instructional programs in each local school system.

(b) The established six year cycle for the selection and adoption of textbooks shall determine the order of implementation of the state curriculum framework, grades K-12. The state curriculum framework for each subject shall be distributed to local school systems at least one full school year prior to the year in which the textbooks are to be adopted. The six-year cycle shall be in accordance with the following schedule for state textbook adoption and bidding:

Language Arts and Foreign Language	1997
Mathematics and Computer	1998
Vocational Education, Literature, Spelling, and Fine Arts	1999
Reading, Grades 1-12	2000
Social Studies	2001
Science, Health, Agriculture and Home Economics	2002

(c) Instruction in grades K-12 in issues of current concern such as substance use and abuse, environmental education, consumer education, sexual abuse prevention, AIDS education, character education, career education, and safety shall be incorporated in appropriate subject areas and grade levels.

(2) Experimental Projects and Special Courses.

(a) Local school systems may offer special courses not listed in 0520-1-3-.06 on an experimental basis. Each course must be approved in advance each year by the Commissioner of Education. After three

years the course may become a permanent part of the local school program upon approval by the State Board of Education.

(b) The Commissioner of Education, in cooperation with the State Board of Education and local school system, shall have the authority to initiate experimental projects to determine the effectiveness of innovations in content or in the administration of instructional programs. The Commissioner of Education shall report the findings of these experimental projects to the State Board of Education on an annual basis.

(3) Grading and Promotion.

(a) Each school shall evaluate and report in writing to the parent(s) or legal guardian(s) each student's progress in each subject, at least every nine weeks, in accordance with the school system's evaluation plan. A parent or legal guardian will sign or otherwise acknowledge the report and return it to the teacher. Local school systems may choose not to require parental acknowledgment of the grade report for students in grades 7-12. If parental acknowledgment is not required, schools must publish annually the dates and method of reporting student progress and must provide ample opportunities for parents to notify the school of any concerns.

(b) Local school systems shall develop and implement grading, promotion, and retention

policies. The policies shall be communicated annually to students and parents.

(4) Reserved.

(5) Pre-kindergarten, Kindergarten, and Grades 1-3.

(a) Pre-kindergarten programs operated by or through local boards of education and all approved kindergarten programs shall be child-centered, family focused, and developmentally appropriate. Pre-kindergarten programs shall be based on the early childhood education and parent involvement policy of the State Board of Education. Kindergarten programs shall be based on the state curriculum framework.

1. The programs shall provide daily active learning experiences through exploration and play. Hands-on manipulation of real objects shall be emphasized in the learning experiences in preference to worksheet items.

2. The programs shall provide an arrangement of the room, equipment, and materials in learning centers which facilitate both small group and individual child use. Such equipment and materials shall be appropriate in size and complexity to the age of the children.

3. Assessment of pre-kindergarten and kindergarten children shall emphasize the use of observational data and other assessments that support the delivery of an individualized, developmentally appropriate program.

   (i) Standardized or formalized testing may be administered to pre-kindergarten and kindergarten children only for the purposes of diagnosing special educational needs, developing services to support mainstreaming of children with disabilities, and/or for meeting any required federal program eligibility standards.

   (ii) Each local school system shall adopt and implement a comprehensive developmental assessment program for kindergarten children, to be used in developing instructional programs for kindergarten children.

4. Pre-kindergarten programs shall be staffed by at least one teacher for each 20 children and additional educational assistants or other personnel as are required to meet the adult/child ratio standards specified by the State Department of Human Services and administered by the State Department

of Education for child care programs in schools.

5. Pre-kindergarten programs shall use and maintain transportation services (if provided) and facilities which meet the fire, safety, and health standards specified by the State Department of Human Services and Head Start, and administered by the State Department of Education for child care programs in schools.

(b) The curriculum and program structure for children in pre-kindergarten, kindergarten, and grades 1-3 shall be organized to support developmentally appropriate practice and may serve children in ungraded (non-graded or multi-age) groups or classes. Ungraded programs may also be developed in other grades.

(c) A Montessori kindergarten program may be approved if it meets all state requirements for approval as a public school except that compliance of its teachers with the standards and requirements of the Montessori Accreditation Council for Teacher Education (MACTE) and completion of a baccalaureate degree shall satisfy teacher employment standards for teaching in Montessori kindergartens: however, compliance with MACTE standards shall not satisfy employment standards for teaching in public schools.

(6) Areas of Instruction.

(a) Language Arts.

1. Grades K-8.

(i) The language arts program shall be based on the state curriculum frameworks and shall be developmentally appropriate with instruction focusing on receptive and expressive language skills.

(ii) Students whose first language is not English and who are identified as limited English proficient shall be provided with English instruction especially designed for speakers of other languages.

2. Grades 9-12.

(i) Four units of credit in English language arts shall be required for graduation. Literature shall be drawn from diverse cultures.

(ii) Courses in speech, journalism, competency English, and creative writing may be taken for elective credit but will not satisfy the four units of English

language arts required for graduation.

(iii) Students whose first language is not English and who are identified as limited English proficient shall be provided with English instruction especially designed for speakers of other languages. These courses may be used to satisfy the English language requirement for graduation, not to exceed two units.

3. Foreign Languages.

(i) Grades K-8. Foreign language instruction may be incorporated into the curriculum.

(ii) Grades 9-12. Students who elect the university preparation curriculum shall complete two units in anyone foreign language.

(iii) School systems may allow students who are native speakers of languages other than English to complete the graduation requirements for the university preparation curriculum without taking foreign language courses

provided oral and written proficiency in the native language can be documented. Such documented native language proficiency will be noted on the Tennessee high school transcript.

(b) Mathematics.

1. Grades K-8. The mathematics program shall be based on the state curriculum frameworks and shall be developmentally appropriate, with instruction focusing on the use of manipulative to teach mathematical language skills and concepts.

2. Grades 9-12. Three units of credit in mathematics shall be required for graduation. Students shall be required to achieve, by the time they graduate, at least one of the following: Algebra I, Math for Technology II, or the equivalent in an integrated curriculum incorporating National Council of Teachers of Mathematics (NCTM) standards. The State Department of Education shall determine equivalency. Calculators shall be provided for use in all mathematics courses.

(c) Science.

1. Grades K-8. The science program shall be based on the state curriculum frameworks and shall be developmentally appropriate, with instruction focusing on laboratory experiences.

2. Grades 9-12. Three units of science shall be required for graduation. One unit shall be drawn from the physical sciences and one unit shall be drawn from the life sciences. All science courses shall include laboratory experiences.

(d) Social Studies.

1. Grades K-8. The social studies program shall be based on the state curriculum framework and shall be developmentally appropriate, with instruction focusing on experiences to enable students to learn about themselves and others in the community, state, nation, and world.

2. Grades 9-12. The social studies curriculum shall consist of three units and shall include United States history, world history/world geography, economics, and government. The requirement may be met either by combining these subjects or by separate courses.

3. The curriculum shall include African American history and culture.

4. All social studies programs shall include a multi-cultural perspective.

(e) Health, Physical Education, and Wellness.

1. Health and Physical Education, Grades K-8. The health education and physical education programs shall be based on the state curriculum framework and shall be developmentally appropriate with instruction focusing on activities which will promote good health habits and enhance physical fitness.

2. Wellness, Grades 9-12.

(i) Students shall complete 1 unit of wellness. The program shall be based on the state curriculum framework and shall integrate concepts from the areas of health and physical fitness.

(ii) Participation in marching band and interscholastic athletics shall not be substituted for this requirement. Credit earned in two years of JROTC may be substituted for the wellness requirement provided the local board of education has

complied with the requirements of the State Board of Education.

(iii) Participation in marching band and interscholastic athletics shall not be substituted for the wellness requirement. Credit earned in two years of JROTC may be substituted for the wellness requirement provided the local board of education has complied with requirements of the State Board of Education.

3. For pupils who have physical disabilities, the physical education program shall be modified based on the annual written recommendation of a physician. The statement of the physician shall indicate the type of disability and include a recommended activity pro-gram.

(f) Automobile Driver Education, Grades 9-12.

1. Driver education, when offered, must follow the guidelines of the state curriculum framework. The course shall be a one-half unit elective and shall include not fewer than 30 class hours of instruction and six hours of experience behind the wheel. Students shall be permitted to enroll in the

program when they have reached the age of 15 years.

(g) Fine Arts. Students who elect the university preparation curriculum shall complete 1 unit of fine arts.

1. Visual Arts. Grades K-12. The visual art program shall be based on the state curriculum framework and shall be developmentally appropriate with instruction focusing on activities relating to appreciation and production.

2. Music. Grades K-12. The music program shall be based on the state curriculum framework and shall be developmentally appropriate with instruction focusing on activities relating to appreciation and production.

3. Theatre Arts. Grades K- 12. The theatre arts program shall be based on the state curriculum framework and shall be developmentally appropriate with instruction focusing on activities relating to appreciation and production.

4. Dance. Grades K-12. The dance program shall be based on the state curriculum framework and shall be developmentally appropriate with instruction focusing on activities

relating to appreciation and production.

(h) General Education Exploratory Courses. Grades 6-12.

Classes in business education, general agriculture, general home economics and technology education may be offered.

(i) Computer Technology.

1. Grades K-8. The computer technology program shall be based on the state curriculum framework and shall be developmentally appropriate, with instruction focusing on computer literacy and the use of the computer as a productivity tool.

2. Grades 9-12. Classes in computer technology and computer language may be offered.

3. School systems shall verify, beginning September 1, 1994, that all graduating seniors have had the equivalent of at least one year (180 hours) of computer education during their K-12 tenure. Students who transfer from another state during their senior year are exempt from this requirement.

(j) Vocational-Technical Education.

1. Grades K-8. Classes in vocational-technical education may be offered and shall be based on the state curriculum framework.

2. Grades 9-12. Students who elect the technical preparation curriculum shall complete a four-unit program of study focusing on a particular technical area.

(7) Curriculum for Children with Disabilities.

(a) The curriculum for children with disabilities shall be an integral part of the general curriculum of the school. Provision shall be made for instruction in all instructional areas with changes and adaptations, within and/or outside of the regular instructional program, to meet the abilities and needs of the individual child.

(b) An Individualized Educational Program (IEP) shall be designed for every eligible child. An IEP is a written plan for each eligible child, developed in a multidisciplinary team meeting in accordance with the requirements in 0520-l-3-.09.

Authority: *T.C.A. §37-1-603; 49-1-204; 49-1-302; 49-1-404; 49-6-101; 49-6-20 9(d), 49-6-1003; 49-6-1005, 49-6-1006; 49-6-1007; 49-6-1008; 49-6-1202; 49-6-1203; 49-6-1204; 49-6-1205; 49-6-1302; 49-6-2202; 49-6-2203 and 49-6-3001(c)(3)(A).* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed June 30, 1975; effective July 30, 1975. Amendment filed July 15, 1976; effective August 16, 1976. Amendment filed October 3, 1985;*

effective January 14, 1986. Amendment filed January 17, 1986; effective April 15, 1986. Amendment filed May 20, 1986; effective June 27, 1986. Amendment filed August 26, 1986; effective November 29, 1986. Repeal and new rule filed March 16, 1992; effective June 29, 1992. Amendment filed April 28, 1992; effective July 29, 1992. Amendment filed September 1, 1992, effective December 29, 1992. Amendment filed January 21, 1994; effective May 31, 1994. Amendment filed April 29, 1996; effective August 28, 1996. Amendment filed January 14, 1997; effective May 30, 1997. Amendment filed April 27, 1998; effective August 28, 1998. Amendment filed July 13, 1998; effective November 27, 1998. Amendment filed November 18, 1999; effective March 30, 1999.

0520-1-3-.06 Graduation, Requirement E.†

(1) Graduation Requirements.

Prior to the 9th grade, all students will develop a four-year plan of focused and purposeful study. This plan will be developed when the student is in the eighth grade by the student, partner(s), and faculty advisor or guidance counselor. The plan will be reviewed annually.

(a) Types of Diplomas.

1. The regular diploma will be awarded to students who (1) earn the specified 20 unites of credit or satisfactorily complete an individualized educational program, (2) make passing scores on all subtests of the proficiency or competency test, and (3) have satisfactory records of attendance and conduct.

2. Students may graduate with honors if they (1) complete the core curriculum and either the university preparation curriculum or the technical preparation curriculum, (2) maintain at least a 3.0 academic average on a 4.0 scale, (3) meet the competency test standards, (4) have satisfactory records of attendance and conduct, and (5) meet such additional requirements as are specified by local school systems.

3. The high school certificate will be awarded to students who have earned the specified 20 units of credit and who have satisfactory records of attendance and conduct, but who have not met proficiency or competency test standards.

4. The special education diploma will be awarded to students who have satisfactorily completed an individualized education program, and who have satisfactory records of attendance and conduct, but who have not met proficiency or competency test standards.

(b) Regular Diploma

1. The following 20 units shall be required for graduation for students who entered the 9th grade during the 1983-84 school year through the 1990-91 school year.

Courses	Units
English Language Arts	4
Mathematics	2
Science	2
United States History	1
Economics	1/2
Physical Education	1
Health Education	1/2
Electives	9
Total	20

2. The following 20 units shall be required for graduation for students who enter the 9th grade during the 1991-92 school year through the 1992-94 school year.

Courses	Units
English Language Arts	4
Mathematics	2
Science	2
United States History	1
United States Government	1/2
Economics	1/2
Additional courses in Mathematics*, Science, or World History, World Geography, Ancient History, Modern History, or European History	1 1/2
Physical Education	1
Health Education	1/2
Electives	7
Total	20

* Students who enter 9th grade in 1993-94 shall be required to complete 3 units of mathematics as part of the 13 units specified by the State Board of Education.

3. The following 20 units shall be required for graduation for students who enter the 9th grade in 1994-95 and thereafter; Students shall complete the core curriculum plus either the university preparation curriculum or the technical preparation curriculum.

Core Curriculum	Units
English Language Arts	4
Mathematics	2
Science	3
Social Studies**	3
Wellness	1
Total	14

* Students who enter 9th grade in 1994-95 and thereafter shall be required to achieve, by the time they graduate, at least one of the following: Algebra I, Math for Technology II, or the equivalent in an integrated curriculum incorporating National Council of Teachers of Mathematics (NCTM) standards. The State Department of Education shall determine equivalency.

** The social studies curriculum shall include United States history, world history/world geography, economics, and government.

University Preparation Curriculum	Units
Foreign Language	2
Fine Arts	1
Electives	3
Total	6

Technical Preparation Cirriculum	Units
Program of study focusing on a particular technical area	4
Electives	2
Total	6

(c) Honors Diploma and Graduation with Honors.

1. Course Requirements

(i) Students who enter the 9th grade through and including the school year 1993-94 are eligible for an honors diploma if they meet the following minimum requirements:

General Core Courses

	Credits
English (honors level, if offered)	4
Math (Algebra I or Math for Technology II, Algebra II, and Geometry or	

Advanced Math)	3
Science	3
Social Studies (United States History, Economics and 1 1/2 additional units)	3
Physical Education	1
Health Education	1/2

General Education		or	Vocational Education	
Foreign Language	2		Vocational Education	4
Fine Arts	1		Electives	2
Total	20 1/2		Total	20 1/2

(ii) Students who enter 9th grade in 1994-95 or thereafter may graduate with honors if they complete the core curriculum and either the university preparation curriculum or the technical preparation curriculum. School systems may specify additional requirements, such as requiring students to demonstrate performance of distinction in one or more areas.

2. For an honors diploma or graduation with honors, the overall grade point average shall be 3.0 on a 4.0 scale.

3. If students have taken the equivalent of high school level courses, they may meet course requirements in accordance with local board of education policies permitting credit by examination.

(d) A competency test shall be administered to all high school students. Achieving minimum standards on all required subtests shall constitute one requirement for

graduation with a regular diploma and graduation with honors. The test shall first be administered to students in the ninth grade. Students who fail to meet the minimum standards on any subtest shall be given the opportunity to be retested during any of the regularly scheduled administrations of the test. A student shall not be required to be retested on any subtest for which minimum standards on the competency test, proficiency test, or the competency/proficiency screening were previously achieved.

1. Students must meet a minimum standard of 70% of the test items answered correctly on each of two subtests: one subtest to test competency in mathematics and one subtest to test competency in language arts.

2. Any student who has received a special education diploma or a high school certificate regardless of the date of issuance may, at any time during a regularly scheduled administration of the competency test, take the competency test and upon passing the test be awarded a regular high school diploma.

3. Students who entered high school prior to or during the 1993-94 school year may fulfill this requirement by meeting the minimum standards on the proficiency test until September 1, 1997, after which time the proficiency test will no longer be administered.

(e) Academic Program. The following is a listing of courses which may be offered for credit in grades 9-12.

1. Automobile Driver Education

2. Reserved

3. Computer Technology

   (i) Personal Computing
   (ii) BASIC
   (iii) Pascal
   (iv) FORTRAN
   (v) C
   (vi) C++
   (vii) Advanced Placement Computer Science
   (viii) Computer Productivity Applications
   (ix) Interactive Multimedia Design
   (x) Adventures in Computing

4. Fine Arts

   (i) Visual Art
   (ii) Art History
   (iii) Vocal Music
   (vi) Instrumental Music
   (v) General Music
   (vi) Music Theory
   (vii) Music History
   (viii) Dance
   (ix) Theatre Arts

5. General Education Exploratory

(i) General Agriculture
(ii) General Home Economics

6. Health and Physical Education

(i) Physical Education*
(ii) Health Education

* Participation in interscholastic athletics and marching band may be substituted for the physical education graduation requirement during the period of participation in accordance with local board of education policies.

7. Language Arts

(i) English Language Arts I, II, III, IV
(ii) Applied Communication*
(iii) Advanced Placement English**
(vi) Speech
(v) Journalism
(vi) Competency English
(vii) Creative Writing
(viii) Latin I, II, III, IV
(ix) French I, II, III, IV
(x) German I, II, III, IV
(xi) Spanish I, II, III, IV
(xii) Russian I, II, III, IV
(xiii) Japanese I, II, III, IV
(xiv) Other Languages I, II, III, IV

* Applied Communication satisfies either the English III or the English IV credit required

for graduation. The teacher shall hold an endorsement in English 7-12.

** Advanced Placement English programs of the College Board may substitute for English III or English IV.

8. Mathematics

(i) Arithmetic 9*
(ii) Applied Mathemathics I
(iii) Applied Mathemathics II
(vi) Pre-Algebra
(v) Math for Technology I
(vi) Math for Technology II
(vii) Algebra I
(viii) Algebra II
(ix) Unified Geometry
(x) Math IV
(xi) Trigonometry
(xii) Probability and Statistics
(xiii) Pre-Calculus 1/2
(xiv) Pre-Calculus
(xv) Calculus

* Arithmetic 9 is available as a review course for students who have not mastered proficiency objectives. A credit in this course may serve as an elective, but shall not serve as one of the units in mathematics required for graduation.

9. R.O.T.C. Military Science*

* Credit earned for R.O.T.C. may substitute for physical education required for graduation.

10. Science

(i) Life Science
(ii) Biology I, II
(iii) Anatomy and Physiology
(iv) Advanced Placement Biology
(v) Chemistry I, II
(vi) Advanced Placement Chemistry
(vii) Earth/Space Science
(viii) Geology
(ix) Environmental Sciences
(x) Ecology
(xi) Physical Science
(xii) Physics
(xiii) Advanced Placement Physics

11. Social Studies

(i) World History
(ii) Ancient History
(iii) Modern History
(iv) World Geography
(v) United States History
(vi) United States Government*
(vii) Economics**
(viii) Anthropology
(ix) Sociology
(x) Psychology
(xi) Contemporary Issues
(xii) African-American History
(xiii) Advanced Placement United States History
(xiv) Advanced Placement European History

* The United States government requirement for graduation may be satisfied by one semester of American Business/Legal Systems or by three years of JROTC.

** The economics requirement for graduation may be satisfied by two semesters of marketing education, one semester of International Business, one semester of Consumer Economics, or out-of-school experiences through Junior Achievement.

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0520-1-5-.02 Minimum Standards for School Buses.

(1) All school buses purchased by a county, local school system, or private contractor shall meet the Tennessee Minimum School Bus Standards approved by the State Board of Education and all applicable federal motor vehicle safety standards.

(a) Van type equipment may be used to transport not more than 15 students to and from interscholastic athletic or other interscholastic or school sponsored activities. Such van type equipment may be owned and operated by the local education agency or may be operated by or for the local education agency under a rental or for hire arrangement entered into by the agency with respect to the specific activity in connection with which such transportation is to be furnished.

1. Any van type equipment designed to transport not fewer than seven (7) nor more than ten (10) persons that is owned or rented by the school system and used to transport students must be in apparent safe operating condition (as referenced in (a)3(i) of this rule), insured to comport to the minimum requirements of T.C.A. §29-20-101 et seq., and driven by a properly licensed employee of the school system.

2. Any van type equipment designed to transport not fewer than seven (7) nor more than ten (10) persons operated for the local education agency under a for hire arrangement (both van and driver are arranged) to transport students must be in apparent safe operating condition (as referenced in (a)3(i) of this rule), insured to comport to the minimum requirements of T.C.A. §29-20-101 et seq., and driven by a properly licensed driver.

3. Van type equipment designed to transport not fewer than eleven (11) nor more than sixteen (16) persons can be used to transport up to fifteen (15) students. When transporting students, all drivers of such van type vehicles shall possess an appropriate school bus endorsed commercial driver s license issued by the Tennessee Department of Safety. Such van type equipment must be inspected by the

Tennessee Department of Safety prior to its use. The inspections will be made at sites determined and scheduled by the Department of Safety. Local education agencies shall furnish evidence of insurance to the inspector of the van type vehicle at the time of inspection with limits which comport to the minimum requirements of T.C.A. §29-20-101 et seq. A sticker evidencing approval for operation shall be issued to the owner of the vehicle and shall be affixed to the vehicle at the time of completion of the inspection. The approval shall be effective for a one year period. The inspection shall include the following areas:

(i) The van-type equipment is in safe, operating condition including an inspection of brakes, tires, glass, and seat belts and an inspection for fluid leaks;

(ii) The drive shaft is restrained by drive shaft loop hangers, except for front wheel drive vans;

(iii) The van contains a fire extinguisher, first aid kit and a body fluid kit; and

(iv) The van has in place an internal release latch for all doors.

4. No waivers shall be issued by any agency or department for the rules pertaining to the use of van type equipment.

5. Notwithstanding any part of this rule to the contrary, any van type equipment designed to transport (11) or more persons purchased by a local education agency after the effective date of this rule shall conform to all applicable Federal Motor Vehicle Safety Standards (FMVSS) if used for pupil transportation.

(2) Vehicles constructed for transporting children with disabilities shall comply generally with the Tennessee Minimum School Bus Standards approved by the State Board of Education but, because of special equipment, appropriate modifications shall be made for children with disabilities.

Authority: *T.C.A. § 49-1-30; 49-6-2102 and 49-6-2115.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed July 15, 1976; effective August 16, 1976. Amendment filed February 28, 1978; effective March 30, 1978. Amendment filed January 9, 1979; effective February 23, 1979. Amendment filed April 14, 1980; effective May 28, 1980. Amendment filed November 13, 1981; effective March 16, 1982. Amendment filed September 28, 1982; effective December 15, 1982. Amendment filed April 15, 1983; effective May 16, 1983. Amendment filed*

May 28, 1986; effective June 27, 1986. Amendment filed January 15, 1987; effective April 29, 1987. Repeal and new rule filed March 16, 1992; effective June 29, 1992. Amendment filed May 28, 1999; effective September 28, 1999.

0520-6-10-.01 Goals for Education in Tennessee. †

(1) This Physical Education Framework is designed to facilitate the accomplishment of the State Board of Education's goals which are stated in *Rules, Regulations, and Minimum Standards* as follows:

(a) Every Person Should:

1. Have competence in the fundamentals of learning and communication.

2. Develop skills and attitudes which facilitate learning.

3. Have sufficient information to realize life goals.

4. Know the principles, habits, and attitudes conducive to good physical and mental health.

5. Establish and maintain satisfactory relations with others.

6. Know and practice the basic requirements of responsible citizenship.

7. Have competence in the use of natural resources and in maintenance of ecological balance.

8. Acquire career information and economic competence.

9. Appreciate cultural and aesthetic values.

10. Be aware of the increasing interdependence among people and nations.

***Authority**: T.C.A. §49-1-302. **Administrative History:** Original rule filed October 1, 1985; effective January 14, 1986. Repeal and new rule filed April 14, 1993; effective July 28, 1993.*

0520-6-10-.02 Goals for Physical Education in Tennessee.†

(1) The purpose of physical education is to develop the student physically socially, and ethnically through large muscle skill development activities. The student will achieve this goal by:

(a) Developing and maintaining an optimal level of physical fitness and appreciating its value.

(b) Understanding and utilizing a variety of activities which are appropriate for lifetime enjoyment as a participant and/or a spectator.

***Authority**: T.C.A. §49-1-302. **Administrative History:** Original rule filed October 1, 1985; effective January 14, 1986. Repeal and new rule filed April 14, 1993; effective July 28, 1993.*

0520-6-10-.03 Rationale. †

(1) Instruction in physical education provides a planned, balanced, and varied progression of activities based upon the needs, abilities, and interests of students at all developmental levels.

(2) The 9-12 program serves to refine existing skills and develop new ones. Emphasis is placed on lifetime sports and activities with carryover value. The instruction focuses on the involvement, knowledge, and understanding necessary to achieve the lifetime goal of personal fitness.

***Authority**: T.C.A. §49-1-302. **Administrative History:** Original rule filed October 1, 1985; effective January 14, 1986. Repeal and new rule filed April 14, 1993; effective July 28, 1993.*

0520-6-10-.04 Description of Strands. †

(1) GAMES/SPORTS: Provides for instruction in the techniques for successful and enjoyable participation in organized and group physical activities. Subject matter also covers the value of using rules and strategies and the role of games and sports in developing physical fitness and using leisure time.

(2) GYMNASTICS: Designed to help the student achieve potential in overall body development. Emphasis is placed on the desirability of a variety of body movements and the importance of safety in gymnastic activities.

(3) PHYSICAL FITNESS: Provides for instruction in the elements of a program necessary for improving physical fitness. Content focuses on activities essential for building optimal fitness and value of fitness as a lifetime activity.

(4) RHYTHMIC MOVEMENT: Teaches the value of rhythmic training including the function of rhythmic activities in leisure time and the role of these activities in the appreciation of other cultures. Content focuses on the pattern and design of music.

***Authority**: T.C.A. §49-1-302. **Administrative History:** Original rule filed October 1, 1985; effective January 14, 1986. Repeal and new rule filed April 14, 1993; effective July 28, 1993.*

0520-6-10-.06 Strands.†

GOAL: 9-129100 Understanding the Contribution of Organized Physical Activity to the Total Development of the Individual.

GRADE 9-12

GAMES/SPORTS	GYMNASTICS	PHYSICAL FITNESS	RHYTHMIC MOVEMENT
CONCEPT: Individuals enjoy team sports as participants and spectators. OBJECTIVES 9-1291A1 - To understand the role of skill development in games/sports. 9-1291A2 - To understand rules and strategies employed in games/sports.	CONCEPT: Gymnastic abilities develop body flexibility, strength and fitness. OBJECTIVES 9-1291B1 - To understand the role of gymnastics in the physical education program. 9-1291B2 - To understand factors which contribute to safety in gymnastics.	CONCEPT: Physical fitness development requires appropriate exercise. OBJECTIVES 912291C1 - To understand the role of the individual in maintaining personal fitness. 9-1291C2 - To understand various factors which contribute to fitness. CONCEPT: Lifetime activities can contribute to personal fitness. OBJECTIVES 9-1291C3 - To understand how activities can be engaged in through life. 9-1291C4 - To understand the development of the skills necessary to engage in various lifetime activities.	CONCEPT: Rhythmic movement influences an individual's level of fitness and balance. OBJECTIVES 9-1291D1 - To understand the importance of rhythmic movement. 9-1291D2 - To understand factors involved in moving rhythmically.

Authority: *T C A 49-1-302(a)(8).* ***Administrative History*** *Original rule filed October 1, 1985, effective January 14, 1986. Amendment filed August 16, 1991, effective November 27, 1991.*

0520-7-2-.03 Category II: Agency Approval.

(1) The State Board of Education may approve the school approval procedures of non-public school accrediting agencies.

(2) Schools holding full accreditation status with an approved agency are approved by the State Department of Education.

(3) Home schools which may affiliate with an approved agency are not approvable under this category.

(4) Procedures for Application as an Approved Non-Public School Accrediting Agency.

(a) An agency seeking approval shall apply to the State Department of Education and shall supply relevant information needed by the department.

(b) The State Department of Education shall review the application of the agency with respect to the criteria for approval and recommend to the State Board of Education that the application be approved or denied. The applicant agency may address the State Board of Education at the time its application is being considered.

(5) Period of Approval.

(a) The period of approval for a recognized agency shall be five years.

(b) An agency which fails to meet the minimum standards for agency approval will have its approval revoked.

(6) Criteria for Approval of a Non-Public School Accrediting Agency.

(a) Scope of Operation of Agency. The agency shall:

1. Have a clearly written statement of its objectives;

2. Delineate the process by which it approves schools; and

3. Have at least five member schools, each with at least ten full-time students.

(b) Organization of Agency. The agency shall:

1. Specify qualifications for professional personnel for the agency,

2. Employ at least one full time director or superintendent; and

3. Be permitted to regulate schools which are not fully approved.

(c) Agency Responsibilities. The agency shall:

1. Maintain written descriptions of the requirements for school accreditation,

and of the levels or types of membership wanted;

2. Re-evaluate approved schools annually;

3. Give advance publication of proposed changes in approval standards to schools. These changes must be approved in advance by the State Department of Education;

4. Advise schools or directly provide them with technical assistance to address deficiencies;

5. Publish approval policies and lists of approved schools;

6. Require schools to report on deficiencies which could affect approval status;

7. Have procedures for revocation of approval;

8. Provide a list of all courses taught and the grade levels at which they are taught at each school;

9. Publish and follow minimum standards using the following criteria (or, the agency may use the standards as set forth in the Rules, Regulations and Minimum Standards for the

Governance of Public Schools in the State of Tennessee):

(i) Curriculum and Graduation.

(I) The program shall include (but not be limited to) the areas of reading, composition, speech, mathematics, social studies, science, art, music, health and physical education.

(II) Each school shall use print and nonprint materials, including textbooks, which are adequate to meet the needs of the instructional program. See Chapter 0520-1- 3.

(III) Each student shall meet the same minimum requirements for graduation as students in public schools. The specific requirements are listed in Chapter 0520-1-3.

(ii) Inservice. Each school shall have a minimum of five days for inservice education per school year.

(iii) Teacher Licensure and Evaluation.

(I) Each agency shall submit its procedures for licensing teachers. If the agency does not use the Tennessee State Department of Education licensure system, it must use a comparable system based upon educational training.

(II) Each teacher or principal shall hold a valid teacher license or permit as defined by the agency covering the work assignment.

(III) Each agency shall develop procedures for evaluation of all professional school personnel.

(iv) Facilities.

(I) Each school shall comply with rules, regulations, and codes of the city, county, and state regarding

planning of new buildings, alterations, and safety.

(II) Each school shall observe all fire safety regulations and procedures promulgated by the Tennessee Fire Marshal sOffice.

(III) Each school shall have classrooms, laboratories, and libraries which are sufficient in number, adequate in space, and so constructed and arranged as to be conducive to carrying on the assigned activities. Playgrounds and physical education facilities shall be well maintained, free from hazards, and large enough to permit an adequate program of physical education.

(v) Administrative Rules.

(I) Each school shall maintain an operating schedule that includes

the minimum number of instructional days and hours required of public schools. See Chapter 0520-1-3.

(II) Each school which provides services to students certified as eligible students with disabilities shall meet all standards of the State Board of Education rule 0520-1-3-.09.

(III) A child entering first grade shall be no less than six years of age on or before September 30. Any child five years of age on or before September 30 may be enrolled in kindergarten.

(IV) Each school shall develop and implement a written policy on promotion and retention. The written policy shall be communicated to students and parents.

(V) The maximum enrollments for an individual class shall be specified and shall not exceed state maximum class sizes for the same subject and grade level.

(VI) Each school shall maintain complete and accurate permanent records. A cumulative record for each student for all work through high school is required.

(VII) Each school shall evaluate records and report the needs and progress of its pupils.

(VIII) Each school shall provide a sufficient number of appropriately qualified administrators, librarians and guidance counselors for the student body served.

(IX) Each principal or head-master shall comply with the requirement of T.C.A. 49-6-5001 that each child enrolled in

school be vaccinated against disease.

(X) Each principal or headmaster shall comply with the requirements of T.C.A. 49-6-3007 regarding reporting the names, ages, and addresses of all pupils in attendance to the superintendent of the public school system in which the school is located.

(vi) Testing Program. At least once every school year, each school shall give a nationally standardized achievement test covering the areas of reading, language arts, spelling, math, science, and social science to each pupil in grades 2 through 8 and grade 10; the results must be communicated to teachers and parents and kept on file at the school for one calendar year.

Authority: *T. C.A. § 49-1-3 02.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

RONNIE CARTER,

Having been first duly sworn, was examined and deposed as follows:

* * * *

A. Yes, sir, I think. It looks like the constitution and bylaws of the Tennessee Secondary School Athletic Association.

Q. Now Exhibit 3, was there a time when the bylaw provisions had to be approved by the state board of education?

A. No sir, not to my knowledge.

Q. Any changes had to be approved by the state board of education?

A. No, sir.

[p. 12:16-25]

Q. And you and the other staff members of the TSSAA are members of the Tennessee Consolidated Retirement System; is that right?

A. Yes, sir.

Q. How did that come about? Do you know?

A. There was legislative actions in, I think, the early 50's in regard to three bodies. As I remember, it's TSSAA, the TEA, Teachers' Education Association, which is a voluntary organization, and also the Tennessee School Board Association, TSBA. Because at that time most of the people they could attract in their employment were going to be coming out of teaching professions. And most of those people were in the Teachers' Retirement System. So it is my understanding that those three bodies went in by special act of legislature, those three voluntary associations were allowed to be members not of the Teachers' Retirement

System, but – I don't know what the correct terminology would be, but to be a part of the retirement system.

[p. 271:5-23]

A. I just – you know, when you take in all sports, everything, I just would be very hesitant to make any estimation of numbers. A lot of our schools play nonmember schools because they're – because there are a lot of nonmember schools in our state that have athletics, and there are a lot of nonmember schools surrounding our state that are approved by the Southern Association which our member schools play also.

[p. 273:20 - 274:2]

Q. Mr. Carter, is TSSAA a state agency?

A. No, sir.

Mr. NEBEL: Objection.

BY MR. COLBERT:

Q. Is it a corporation?

A. Yes, sir.

Q. When was TSSAA formed?

A. In 1925.

Q. When was the State Board of Education's rule about review or approval of TSSAA rules adopted?

A. I don't know the specific date, but I think it was sometime in the mid to late 60's.

Q. From the time that TSSAA started in 1925 until that rule was adopted, are you aware of the State Board of Education or the Tennessee Department of Education or any other agency of state government having any control over TSSAA activities?

A. No, sir.

Q. Once that rule was adopted, did anything change with regard to the State's control or lack of control over TSSAA's activities?

A. No, sir.

MR. NEBEL: Objection to the last question.

BY MR. COLBERT:

Q. How is the retirement account with TCRS or TSSAA employees funded?

A. It's funded by – the responsibility for all funding is by the Tennessee Secondary School Athletic Association.

Q. Does the legislature in its annual appropriations bill appropriate any funds to TSSAA?

A. No, sir.

Q. Does the State Board of Education or any other state agency have authority to approve or disapprove the contracts of TSSAA?

A. No, sir.

Q. Is TSSAA required to make any reports to the State Board of Education or any other agency of the State of Tennessee?

A. No, sir.

Q. Mr. Nebel asked you about the makeup of the Board of Control in the Legislative Council. Who is eligible to run for the Board of Control in the Legislative Council?

A. Any principal or assistant principal if they're a full time administrator of any member school can run, and any superintendent who is superintendent -- I believe we stated some city school systems that has no more than one high school that is a member.

Q. Does that include principals or headmasters of independent schools?

A. Yes, sir.

Q. Have you had principals or headmasters of independent schools on the Legislative Council?

A. Yes, sir.

[pp. 291:1 - 293:5]

Q. Look on Page 42 of the handbook at the guidelines for understanding the recruiting rule, and understanding what is undue influence. When were those guidelines developed?

A. Around – I believe that date was probably around 1992. Around 1992.

Q. Do you recall who was responsible for developing those guidelines?

A. Yes, sir, that was – we had a committee that was set by the Legislative Council. Basically went back and added areas of some of the questions that were there, and also helped to begin to develop those guidelines.

Q. Do you recall who was on that committee?

A. Yes, sir.

Q. Who?

A. Bill Stanfield was the president of the council at that time from Overton High School. Gordan Perry from Haywood County High School, or Jim Phifer who was at the time vice president of the council for Notre Dame high school in Chattanooga.

Q. Is Notre Dame an independent school?

A. Yes, sir.

Q. Mr. Cater, how long was Mr. Phifer on the Legislative Council?

A. I don't remember exactly, but he served one of the longest tenures that we had. It would be in excess, probably, of 15 or 20 years.

Q. Why did he leave the Legislative Council?

A. He retired.

Q. Has Bill Brown, headmaster of Brentwood Academy, ever sought election to the Board of Control or the Legislative Council, to your knowledge?

A. No, sir.

Q. Mr. Nebel asked you about games being played at public facilities or in public stadiums or in public gymnasiums. Does TSSAA receive any portion of the gate receipts from regular – season contests between its member schools?

A. No, sir.

Q. What contests regardless of where they're played, at public facilities or private facilities, what contests does TSSAA receive part of the gate receipts from?

A. Only tournaments and play-offs and then only certain sports in that category. We don't receive them in all tournaments, but in certain tournaments and certain sports.

Q. Which tournaments does TSSAA receive a portion of the gate on?

A. It's in our bylaws. It's Article 3, Section 17, and those are district and regional girls volleyball, district and regional girls soccer, district and regional soccer, district and regional track and field meets, invitational and regional wrestling tournaments, the invitational county conference, district and regional basketball. Then the state tournaments after expenses are held, the state tournaments series. We do not receive any receipts in district and regional baseball and softball, nor in cross country if they charge. I think that would be the two sports.

Q. How are the sites for the TSSAA tournament series selected?

A. District and regional level they're selected by the schools in that district, that make up the district, or the schools that make up – it depends on how the setups are, but district and regional level they're made by the school.

Q. Does the Legislative Council or the Board of Control dictate to the schools in a district or a region where they must – what site or what facility they must use for their tournament or play-offs?

A. No, sir, it's left up to the schools.

Q. Are private facilities ever used for any of the play-off series events.

A. Yes, sir.

Q. Where is the Clinic Bowl ordinarily played?

A. Vanderbilt University.

[pp. 293:23 - 296:24]

Q. Mr. Cater, what portion of TSSAA's annual income is made up of membership dues?

A. It's about 70 thousand of about a 1.6 million budget. Whatever that is.

[p. 298:21-24]

WILLIAM BAILEY BROWN, JR.,

having been first duly sworn, was examined and deposed as follows:

* * * *

DIRECT EXAMINATION BY MR. COLBERT:

Q. Will you state your full name, please, sir.

A. William Bailey Brown, Jr.

Q. And what's your current occupation, Mr. Brown?

A. I'm the headmaster at Brentwood Academy.

Q. How long have you served as the headmaster of Brentwood Academy?

A. We were founded in '69 and opened the doors in '70. So let's see, this is '97 –

[p. 5:2-13]

Q. When did Brentwood Academy first join TSSAA?

A. And I'm not sure at all about this, but I would think it was probably our second or third year. The first year we did play some TSSAA schools. I remember the football schedule was a B team schedule, but I'm not -- we may have had to be members at that point. I can't really remember.

Q. Has Brentwood Academy ever been a member of any other interscholastic athletic association besides TSSAA?

A. Not that I can recall. Now, our middle school belongs to the Harpeth Valley Athletic Conference, HVAC, which is made up of some public schools and some independent schools. But that's the only part of us that I think belongs, that I can remember.

[p. 8:11-24]

Q. How often does Brentwood Academy renew its membership with TSSAA?

A. Annually.

Q. All right. Do you know if TSSAA is required to accept Brentwood Academy as a member each year?

A. I would think they don't have to. I don't know.

[p. 157:19-25]

Q. But TSSAA has continued to accept Brentwood Academy's membership applications every year, correct?

A. Yes.

Q. And Brentwood Academy doesn't have to join each year, but it has done so, correct?

A. Yes, that's correct.

Q. And each year when Brentwood Academy joins, there's a little card that's a membership application that a representative of the school has to sign, right?

A. Yes, if I remember correctly.

[p. 158:1-10]

BY MR. COLBERT:

Q. Now look, if you will, at the last two of these cards in this collective exhibit. Both of these were signed by you, were they not?

A. '97 was.

Q. What about '96?

A. '96 was, yes.

Q. And on both of these cards, just like in the preceding ones, you agreed as the headmaster that Brentwood Academy would conduct its athletic program for that year in accordance with the rules and decisions of the TSSAA, right?

A. Yes.

Q. And the most recent one of those agreements you made on behalf of Brentwood Academy was dated August the 12th, 1997, one day before the hearing in Fayetteville, correct?

A. That's correct.

Q. And 11 days before the final decision of the board of control, right?

A. Yes.

Q. And you agreed on that card to comply with the decisions of the TSSAA, right?

A. Yes.

Q. And in making that agreement, you agreed to comply with the provision of the TSSAA constitution that says the board of control acts as a final court of appeals, right?

[pp. 159:7 - 160:9]

[Exhibit 12]

Tennessee Secondary School Athletic Association
P. O. Box 319 3333 Lebanon Road
Hermitage, Tennessee 37076
615/889-6740 Fax 615/889-0544

July 29, 1997

Mr. Bill Brown, Principal
Brentwood Academy
219 Granny White Pike
Brentwood, TN 37027

Dear Mr. Brown:

This is in regard to questions concerning possible violations of TSAA Bylaws by Brentwood Academy. Members of our staff have met with members of Brentwood Academy's staff concerning a number of items. In addition, there have been written responses from both our office and Brentwood Academy concerning these areas. We have also met with four student-athletes from two different middle schools and six coaches from four different middle schools concerning contacts with student-athletes in their schools.

After reviewing all of the information, the following is a summary of the concerns and violations:

1. Concern. The practice of providing free tickets for Brentwood Academy games to coaches at other middle schools. It is of great concern that the present policy is totally at the discretion of Coach Carlton Flatt, with Coach Flatt stating that two is the usual number. This leaves too many opportunities for

middle school student-athletes to be admitted at no charge.

Violation. Article II, Section 21 (Recruiting): It has been determined that at least one specific violation in this area occurred when a coach from Neely's Bend Middle School was left three tickets, with two being used by student-athletes. The response from Brentwood Academy is that the coach was told not to bring athletes above the sixth grade. The most critical part of understanding the "recruiting rule" is Guideline #8 which states:

> Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

2. Concern. There is only one reference to seventh grade and above in the questions and answers in the Recruiting Rule (Q.4, example 4). Example #7 in Q. 4 specifically states that students being admitted free to contests is a guide in determining whether undue influence has been used. Brentwood Academy has indicated that students below the seventh grade would be admitted free to its games.

Violation. Article II, Section 21 (Recruiting): It has been determined that there was at least two situations where students below the seventh grade have been admitted free.

3. Concern. The concept expressed by Brentwood Academy is that students that have gone through Brentwood Academy's "enrollment process" are seen differently than other students in terms of TSSAA rules. It is critical first to understand that "enrolled," by TSSAA rules, means a student in regular attendance at a particular school. Students can only be enrolled at one school and each of the students in question is enrolled at a middle school.

It has been defined to our staff by Brentwood Academy that "enrollment" means a student or parents having made contact to Brentwood Academy, information and an application are then sent to the student and family, the student is then tested, the student is then accepted or rejected by Brentwood Academy and notified, and, if accepted, the family then signs a contract indicating the student will attend. We were first told that a student must pay a $300.00 deposit on tuition for the following year. We were then told that a student applying for financial aid does not have to pay the $300.00 fee. We were further informed that students have gone through the process and then not attended Brentwood Academy in the fall.

It seems very apparent that this process creates many opportunities for problems. It obviously does not assure Brentwood Academy that the students will be attending. It is also obvious that a family could go through this process at any number of schools.

Going through this simple process does not open the doors for Brentwood Academy to contact or treat

these students in any different manner than students who have not gone through the process.

Violation. Article II, Section 21 (Recruiting): It is very apparent from talking with students and, also, Coach Flatt that students have been contacted by Brentwood Academy about athletics, both in writing and by telephone, prior to the time they were "enrolled" under TSSAA rules. While the information indicates it is to inform them of opportunities, all of this could easily be a part of any application process. This is explained in Question #3, and examples 3 and 4 under Question 4 in Article II, Section 21 of the Bylaws.

4. Concern: Of 21 rising ninth grade students who have gone through this process, 12 received a letter from Mr. Flatt and follow-up telephone calls regarding participation in spring practice. While participation in spring practice by students enrolled in another school is not a violation in itself, for it to occur in the manner it has occurred resulted in going beyond what is normal and appropriate. In the past, Brentwood Academy has allowed this when it was initiated by a parent in their contact to Brentwood Academy. This resulted in none in 1995 and two in 1996. Only one had contacted Brentwood Academy concerning this in 1997. A change occurred this year to contact all new male students, with 12 participating. The 12 came from nine schools in three different counties, some as far away as 45 minutes.

Violation. Article II, Section 21 (Recruiting): This entire process is seen as beyond what is normal and appropriate and is undue influence.

5. Concern: Information from Brentwood Academy indicates three different members of the coaching staff (Robert Butler, Brad Perry, and John Patton) coach AAU basketball teams in the spring, with those teams involving 15-and-under boys, 13-and-under boys, 12-and-under boys, and 10-and-under girls. The 15-and-under boys have five students enrolled in either the eighth or ninth grade at Brentwood Academy.

It is of great concern to TSSAA that it was expressed by Brentwood Academy in one meeting that TSSAA needs to do something about the AAU problem and at the same time has three members of their coaching staff involved with AAU teams. While this is not a violation, it is of deep concern that the coaches involved are with different age groups, starting with 12 and under. There is obviously the potential for undue influence.

Violation. Article III, Section 13 (Sports Calendar): Brentwood Academy is in violation of the practice rule since a member of the staff is involved with a team (15-and-under boys) with five students presently enrolled in the eighth or ninth grade at Brentwood Academy. Two members of the AAU team were members of the Brentwood Academy high school program in 1996-97 and all five could be members in 1997-98. Schools are limited to 10 practices and two scrimmages in the spring involving a representative of the coaching staff and one or more members of the basketball program.

6. Concern: In talking with four student-athletes from two different middle schools and six coaches from four different middle schools concerning contacts

with student-athletes in their schools, it was found that these contacts have come from persons connected with and persons not connected with Brentwood Academy. There is a recurring theme through all the interviews with students and coaches. Students are being singled out by someone based on athletic ability. It would appear to be of major concern to Brentwood Academy that the only two students from Neely's Bend Middle School to be contacted, approved, and accepted are two top athletes. Neely's Bend is 45 minutes away. The only student to go through the process from East Middle School is also an outstanding athlete. This should cause great concern on the part of Brentwood Academy. The only student from Cameron to go through the process and be accepted is also an outstanding athlete. Three of the four would be among the best athletes in the Metropolitan Public School System at the middle school level.

Violation. This is a violation of the Recruiting Rule. It is obvious that over and over we see persons exceeding what is normal and appropriate, as well as treating athletes and prospective athletes differently than students who are not athletes. At some point, examples 1, 3, 4 and 7 under Question 4 have all been violated.

After reviewing the concerns and violations, the following action is being taken:

1. For violation of the practice rule, Brentwood Academy will not be permitted any off-season practice in football or basketball for two years.

2. For violations of the recruiting rule, Brentwood Academy is being placed on probation for two years and fined $3,000.00 In addition, no athletic team will be permitted the privilege of entering the tournament series for 1997-98. The football program and boys' basketball program will also be denied the privilege of entering the playoffs and tournament series in 1998-99.

   Any further violations of TSSAA rules and regulations during the probation period will result in further disciplinary action.

3. The two students at Neely's Bend, the student at Cameron, and the student at East Middle School will be ineligible to participate in athletics at Brentwood Academy at any level.

I know that you will take the necessary steps, as Headmaster of Brentwood Academy, to see that a violation of this type does not occur again. High school athletics is a part of the total educational program. We cannot justify the existence of high schools athletics if situations such as this are allowed to occur. Participation in high school athletics is a privilege and with that privilege goes responsibility. These responsibilities must be met by everyone involved with the Brentwood Academy athletic program.

If you have any questions concerning this, please feel free to contact me.

Sincerely,

/s/ Ronnie Carter
Ronnie Carter
Executive Director

RC:wmb

cc: The Tennessean (to be mailed August 1, 1997)
Nashville Banner (to be mailed August 1, 1997)
Brentwood Journal (to be mailed August 1,1997)
The Franklin-Review Appeal

[Exhibit 13]

Tennessee Secondary School Athletic Association
P. O. Box 319 3333 Lebanon Road
Hermitage, Tennessee 37076
615/889-6740 Fax 615/889-0544

August 23, 1997

Mr. Bill Brown, Headmaster
Brentwood Academy
219 Granny White Pike
Brentwood, TN 37027

Dear Bill:

This letter is in response to your appeal before the Board of Control at the Sheraton Music City on August 23, 1997.

First, on behalf of the entire Board I commend you and those who appeared on behalf of your school as they delivered information to us. Our Board took time to thoroughly review all the information that was presented today and that had been previously submitted to the state office.

After reviewing and having a detailed discussion on all of the information, the Board's determination is that the following violations of TSSAA regulations occurred:

1. Student-athletes have been admitted free of charge to athletic contests.

2. Contact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools.

3. Brentwood Academy coaches conducting impermissible off-season practice with Brentwood Academy student-athletes.

The details of each of the foregoing violations have been described in previous correspondence from TSSAA Executive Director Ronnie Carter. In order to communicate the decision of the Board of Control to you as soon as possible, I will not take the time to reiterate the factual details of the foregoing violations.

The Board of Control has determined that the appropriate penalty for the foregoing violations are as follows:

1. The entire athletic program of Brentwood Academy will be on probation for four years. If there are further violations during the probationary period, TSSAA will have no choice but to take further disciplinary action.

2. Brentwood Academy's football and boys' basketball programs are suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy is fined $3,000 for the above violations.

4. The Brentwood Academy's football and boys' basketball Programs will not be permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy will meet with the TSSAA Executive Director to develop an administrative control plan to help guard against future problems like those which precipitated this action.

The portion of the previous penalty pertaining to tournament series revenue has been removed. In addition, the Board of Control has decided that no student-athletes should be declared ineligible based on the foregoing violations provided they meet all other eligibility requirements.

Notwithstanding the modifications of the previous penalties by the Board of Control, the foregoing violations are serious. While there is no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials, the Board of Control concurs with the Executive Director's concern about a lack of appropriate administrative control in various aspects of the school's athletic program. These concerns will have to be addressed in the administrative control plan to be developed.

Sincerely,

Mike Reed
President, TSSAA Board of Control

MR:wmb
cc: Ronnie Carter

[Exhibit 19]

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

Name of School: Brentwood Academy
Street: 219 Granny White Pike
Town: Brentwood, TN
Zip Code: 37027.

Our School will participate – (Check One)

Senior High Division (Only) __
Junior Division (Only) __
Senior and Junior Division X

Enrollment for September of Current School Year: 419

Membership Fee: $225.00

(This membership fee includes one year's subscription to TSSAA News for principal and for head coaches at $2.00 per subscription.)

I hereby agree that the Brentwood Academy will conduct its athletics for the year 1989-90 in accordance with the rules and decisions of the TSSAA.

Date: 9/11/89 (Signed) /s/ Bill Brown
Principal or Superintendent

Return This Card Along With Check For Membership Fee Before Jan. 1 to: Tennessee Secondary School Athletic Association, 333 Lebanon Road, Hermitage, Tenn. 37076

Please check the interscholastic sports that you plan to sponsor during the school year, and give name of coach for each sport.

	Senior Division	Junior Division
Football	Carlton Flatt	
Volleyball (Girls)	Dan Pierce	Dan Pierce
Basketball (Boys)	Ricky Bowers	Paul Compton
Basketball (Girls)	David Pack	
Baseball (Boys)	Paul Compton	
Softball (Girls)	Wendell Harris	
Track (Boys)	Charlie Harper	
Track (Girls)	Bill Brown	
Golf (Boys)	Vicki Capehart	
Golf (Girls	Vicki Capehart	
Tennis (Boys)	John Patton	
Tennis (Girls)	Rachel Hall	
Wrestling	Ray Dalton	
Cross Country (Boys)	Charlie Harper	
Cross Country (Girls)	Steve Heaston	
Soccer (Boys)		
Soccer (Girls)		

JA-286

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

Name of School: Brentwood Academy
Street: 219 Granny White Pike
Town: Brentwood, TN
Zip Code: 37027.

Our School will participate – (Check One)

Senior High Division (Only) __
Junior Division (Only) __
Senior and Junior Division X

Enrollment for September of Current School Year: 275 including 2 exchange students who will be here until Sept. 30, 1991

Membership Fee: $400.00

(This membership fee includes one year's subscription to TSSAA News for principal and for head coaches at $2.00 per subscription.)

I hereby agree that the Brentwood Academy will conduct its athletics for the year 1990-91 in accordance with the rules and decisions of the TSSAA.

Date: Aug. 30, 1991 (Signed) /s/ Carlton Flatt
Principal or Superintendent

Return This Card Along With Check For Membership Fee Before Jan. 1 to: Tennessee Secondary School Athletic Association, 333 Lebanon Road, Hermitage, Tenn. 37076

Please check the interscholastic sports that you plan to sponsor during the school year, and give name of coach for each sport.

	Senior Division	Junior Division
Football	Carlton Flatt	
Volleyball (Girls)	Melinda Coille	Karen Gant
Basketball (Boys)	Ricky Bowers	
Basketball (Girls)	David Pack	
Baseball (Boys)	Paul Compton	
Softball (Girls)	Wendell Harris	
Track (Boys)	Charlie Harper	
Track (Girls)	Bill Brown	
Golf (Boys)	Vicki Capehart	
Golf (Girls	Vicki Capehart	
Tennis (Boys)	John Patton	
Tennis (Girls)	Cameron Phillips	
Wrestling	Ray Dalton	
Cross Country (Boys)	Charlie Harper	
Cross Country (Girls)	Charlie Harper	
Soccer (Boys)		
Soccer (Girls)		

JA-288

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

School Name: Brentwood Academy
Address: 219 Granny White Pike
City, State, Zip: Brentwood, TN 37027.

Check the division(s) in which you will participate:

Senior High Division X
Junior High Division X
Middle School Division ___

Membership Fee: $400.00. This membership fee includes one year subscription to TSSAA News for the principal and for head coaches at $10.00 per subscription.

I hereby agree that the Brentwood Academy High School will conduct its athletics programs for the year 1992 in accordance with the rules and decisions of the TSSAA.

/s/ Bill Brown — 9/1/92
Principal's Signature — Date

Return this card no later than December 31 along with check for membership dues to:
TSSAA, 333 Lebanon Road, Hermitage, Tenn. 37076

JA-289

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

School Name: Brentwood Academy;
Address: 219 Granny White Pike
City, State, Zip: Brentwood,TN 37027.

Check the division(s) in which you will participate:

Senior High Division X
Junior High Division ___
Middle School Division ___

Membership Fee: $300.00. This membership fee includes one year subscription to TSSAA News for the principal and for head coaches at $10.00 per subscription.

I hereby agree that the Brentwood Academy High School will conduct its athletics programs for the year 1994 in accordance with the rules and decisions of the TSSAA.

/s/ Bill Brown _____ December 20, 1993
Principal's Signature Date

Return this card no later than December 31 along with check for membership dues to:
TSSAA, 333 Lebanon Road, Hermitage, Tenn. 37076

JA-290

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

School Name: Brentwood Academy;
Address: 219 Granny White Pike
City, State, Zip: Brentwood,TN 37027.

Check the division(s) in which you will participate:

Senior High Division X
Junior High Division ___
Middle School Division ___

Membership Fee: $300.00. This membership fee includes one year subscription to TSSAA News for each school at $10.00 per subscription.

I hereby agree that the Brentwood Academy High School will conduct its athletics programs for the year 1995 in accordance with the rules and decisions of the TSSAA.

/s/ Joe W. Campbell — August 23, 1994
Principal's Signature — Date

Return this card no later than December 31 along with check for membership dues to:
TSSAA, 333 Lebanon Road, Hermitage, Tenn. 37076

JA-291

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

School Name: Brentwood Academy
Address: 219 Granny White Pike
City, State, Zip: Brentwood,TN 37027.

Check the division(s) in which you will participate:

Senior High Division X
Junior High Division ___
Middle School Division ___

Membership Fee: $300.00. This membership fee includes one year subscription to TSSAA News for each school at $10.00 per subscription.

I hereby agree that the Brentwood Academy High School will conduct its athletics programs for the year 1995-96 in accordance with the rules and decisions of the TSSAA.

/s/ Bill Brown _____ 8/23/95 _____
Principal's Signature Date

Return this card no later than December 31 along with check for membership dues to:
TSSAA, 333 Lebanon Road, Hermitage, Tenn. 37076

JA-292

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

School Name: Brentwood Academy
Address: 219 Granny White Pike
City, State, Zip: Brentwood,TN 37027.

Check the division(s) in which you will participate:

Senior High Division X
Junior High Division ___
Middle School Division ___

Membership Fee: $300.00. This membership fee includes one year subscription to TSSAA News for each school at $10.00 per subscription.

I hereby agree that the Brentwood Academy High School will conduct its athletics programs for the year 1996 in accordance with the rules and decisions of the TSSAA.

/s/ William B. Brown, Jr. 11/14/96
Principal's Signature Date

Return this card no later than December 31 along with check for membership dues to:
TSSAA, 333 Lebanon Road, Hermitage, Tenn. 37076

JA-293

MEMBERSHIP APPLICATION

Tennessee Secondary School Athletic Association

School Name: Brentwood Academy
Address: 219 Granny White Pike
City, State, Zip: Brentwood,TN 37027.

Check the division(s) in which you will participate:

Senior High Division X
Junior High Division ___
Middle School Division ___

Membership Fee: $300. This membership fee includes one year subscription to TSSAA News for the principal and for head coaches at $10.00 per subscription.

I hereby agree that the Brentwood Academy High School will conduct its athletics programs for the year 1997 in accordance with the rules and decisions of the TSSAA.

/s/ Bill Brown _____ 8/12/97 _____
Principal's Signature Date

Return this card no later than December 31 along with check for membership dues to:
TSSAA, 333 Lebanon Road, Hermitage, Tenn. 37076

[Exhibit 21]

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

CERTIFICATION OF COMPLIANCE WITH TSSAA POLICY ON RECRUITING

This form must be completed in full, bear the signature of all appropriate personnel and be returned to the TSSAA Office with your Directory Sheet.

INSTRUCTIONS (MUST BE TYPEWRITTEN):

1. This Certification of Compliance with the TSSAA Recruiting Policy must be submitted to the TSSAA Office with your Directory Sheet.
2. Make a photocopy of the completed and signed form for school files.
3. It is essential that the form bear the signature of the principal, athletic director, and all coaches in each varsity sport offered by the school. If coaches in a particular sports(s) have not been determined, list TBA in the appropriate blank(s) and submit a photocopy of this form with that individual(s) signature after he/she has been determined and has reviewed the TSSAA Policy on Recruiting.

Name of School Brentwood Academy

CERTIFICATION OF COMPLIANCE (Read Carefully)

With my signature, I certify that I have read the TSSAA Handbook on Recruiting which has been adopted by the Legislative Council and agree to comply with the provisions of this rule in full. I also certify that I will inform all necessary school personnel, as well as all other individuals associated with this school of the provisions of this policy and of this school's intention to abide by those provisions. I also certify that I know of no one connected or not connected with our school who is in violation of the TSSAA Recruiting Rule.

POSITION	NAME (Must be Typewritten)	SIGNATURE
Principal	Bill Brown	/s/ Bill Brown
Football (Head Coach)	Carlton Flat	/s/ Carlton Flat
Boys' Basketball (Head Coach)	Walt Holman	/s/ Walt Holman
Girls' Basketball (Head Coach)	Robert Butler	/s/ Robert Butler
Baseball (Head Coach)	Buddy Alexander	/s/ Buddy Alexander
Boys' Track (Head Coach)	Charlie Harper	/s/ Charlie Harper
Girls' Track (Head Coach)	Bill Brown	/s/ Bill Brown
Boys' Cross Country (Head Coach)	Walt Holman	/s/ Walt Holman
Girls' Cross Country (Head Coach)	Tracy Polte	/s/ Tracy Polte
Boys' Golf (Head Coach)	Vicki Capehart	/s/ Vicki Capehart
Girls' Golf (Head Coach)	Vicki Capehart	/s/ Vicki Capehart
Boys' Tennis (Head Coach)	David Speakman	/s/ David Speakman
Girls' Tennis (Head Coach)	Jill Holmes	/s/ Jill Holmes
Wrestling (Head Coach)	Ray Dalton	/s/ Ray Dalton
Boys' Soccer (Head Coach)	Charlie West	/s/ Charlie West
Girls' Soccer (Head Coach)	Charlie West	/s/ Charlie West
Softball (Head Coach)	Wendell Harris	/s/ Wendell Harris
Girls' Volleyball (Head Coach)	Karen Forehand	/s/ Karen Forehand
Assistant Coaches	Mickey Jacobs	/s/ Mickey Jacobs
	Bobby Gentry	/s/ Bobby Gentry
	Bill Evans	/s/ Bill Evans
	Ron Harris	/s/ Ron Harris
	Brad Perry	/s/ Brad Perry

[Original stamped received Sept. 28, 1996.]

[Exhibit 22]

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

CERTIFICATION OF COMPLIANCE WITH TSSAA POLICY ON RECRUITING

This form must be completed in full, bear the signature of all appropriate personnel and be returned to the TSSAA Office with your Directory Sheet.

INSTRUCTIONS (MUST BE TYPEWRITTEN):

1. This Certification of Compliance with the TSSAA Recruiting Policy must be submitted to the TSSAA Office with your Directory Sheet.
2. Make a photocopy of the completed and signed form for school files.
3. It is essential that the form bear the signature of the principal, athletic director, and all coaches in each varsity sport offered by the school. If coaches in a particular sports(s) have not been determined, list TBA in the appropriate blank(s) and submit a photocopy of this form with that individual(s) signature after he/she has been determined and has reviewed the TSSAA Policy on Recruiting.

Name of School Brentwood Academy

CERTIFICATION OF COMPLIANCE (Read Carefully)

With my signature, I certify that I have read the TSSAA Handbook on Recruiting which has been adopted by the Legislative Council and agree to comply with the provisions of this rule in full. I also certify that I will inform all necessary school personnel, as well as all other individuals associated with this school of the provisions of this policy and of this school's intention to abide by those provisions. I also certify that I know of no one connected or not connected with our school who is in violation of the TSSAA Recruiting Rule..

POSITION	NAME (Must be Typewritten)	SIGNATURE
Football (Head Coach)	Bill Brown	/s/ Bill Brown
Boys' Basketball (Head Coach)	Carlton Flat	/s/Carlton Flat
Girls' Basketball (Head Coach)	Robert Butler	/s/ Robert Butler
Baseball (Head Coach)	Steve Shipley	/s/ Steve Shipley
Boys' Track (Head Coach)	Buddy Alexander	/s/ Buddy Alexander
Girls' Track (Head Coach)	Charlie Harper	/s/ Charlie Harper
Boys' Cross Country (Head Coach)	Bill Brown	/s/ Bill Brown
Girls' Cross Country (Head Coach)	Charlie Harper	/s/ Charlie Harper
Boys' Golf (Head Coach)	Charlie Harper	/s/ Charlie Harper
Girls' Golf (Head Coach)	Vicki Capehart	/s/ Vicki Capehart
Boys' Tennis (Head Coach)	Vicki Capehart	/s/ Vicki Capehart
Girls' Tennis (Head Coach)	David Speakman	/s/ David Speakman
Wrestling (Head Coach)	Jill Holmes	/s/ Jill Holmes
Boys' Soccer (Head Coach)	Ray Dalton	/s/ Ray Dalton
Girls' Soccer (Head Coach)	Charlie West	/s/ Charlie West
Softball (Head Coach)	Charlie West	/s/ Charlie West
Girls' Volleyball (Head Coach)	Wendell Harris	/s/ Wendell Harris
Assistant Coaches	Randall Wilcher	/s/ Randall Wilcher
	Bill Evans	/s/ William Evans
	/s/ Ron Harris	/s/ Brad Perry
	Randy Locke	/s/ Randy Locke
	/s/ John Patton	/s/ John Patton
	(Signature illegible)	(Signature illegible)
	(Signature illegible)	

[Original stamped received Sept. 5, 1997.]

LYNN BROWN,

having been first duly sworn, was examined and deposed as follows:

* * * * .

Q. During your years on the Board of Control -- well, first of all, when you attend Board of Control meetings, do you do that on school time?

A. Yes, sir.

[p. 44:16-19]

0520-1-2-.08 Interscholastic Athletics.

(6) The State Board of Education recognizes and designates the Tennessee Secondary School Athletic Association as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis. Junior high schools must include grade nine in order to qualify for membership. The authority granted herein shall remain in effect until revoked.

(7) The State Board of Education shall annually approve the current rules and regulations as stated in the Official Handbook of the Tennessee Secondary School athletic Association.

Statutory Authority T.C.A. 49-1-302. Filed March 16, 1992; effective June 29, 1992.

Supreme Court, U.S.
FILED
MAY 22 2000
CLERK

(10)

No. 99-901

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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61 pp

QUESTION PRESENTED

Whether the regulatory conduct of a nominally private secondary school athletic association, which "establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee," *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n.*, 190 F.3d 705, 706 (6th Cir. 1999) (Merritt, J., dissenting from the denial of petition for rehearing *en banc*) and whose "membership consist[s] entirely of institutions located within the same State, many of them public institutions created by the same sovereign," *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), constitutes state action under the Fourteenth Amendment and under 42 U.S.C. §1983.

RULE 29.6 STATEMENT

As an independent not-for-profit school, Brentwood Academy has no parent corporation and has issued no shares of stock.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 180 F.3d 758 (6th Cir. 1999), and is set forth as Appendix A to the Petition for Writ of Certiorari [references to those appendices will hereinafter be cited with a CP prefix]. The order of the court of appeals denying the petition for rehearing *en banc* and Judge Merritt's dissent from the denial of rehearing *en banc* (CP 1-C) are reported at 190 F.3d 705 (6th Cir. 1999). The opinion of the United States District Court for the Middle District of Tennessee (CP 1-B), granting petitioner's motion for partial summary judgment and issuing a permanent injunction, is reported at 13 F. Supp.2d 670 (M.D. Tenn. 1998).

JURISDICTION

The Sixth Circuit entered judgment on June 21, 1999. Petitioner timely filed a petition for rehearing *en banc* on July 2, 1999. On August 30, 1999, the Sixth Circuit denied petitioner's petition for rehearing *en banc*. The petition for writ of certiorari was filed on November 29, 1999, and was granted on February 22, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 are set forth at CP 1-D.

STATEMENT OF THE CASE

The issue presented for resolution in this Court is the state-action status of the regulatory conduct of the Tennessee Secondary Schools Athletic Association (TSSAA). The primary underlying constitutional issue in this matter is petitioner's facial and as applied First Amendment free speech challenge to the TSSAA Recruiting Rule, JA-115-19.

Petitioner is a co-educational, independent, college-preparatory school. Like its counterparts in most states, TSSAA is a nominally private association composed primarily of public schools and local public school officials

and governed during the relevant period exclusively by public high school principals or certain other qualified public school officials (all public employees serving in an ex officio capacity). JA-24. TSSAA coordinates, supervises, and regulates interscholastic athletic competition among public and private high schools in Tennessee.

TSSAA's Recruiting Rule, which is similar to comparable rules in most states, bars independent schools from taking the initiative in contacting or communicating with prospective student-athletes individually or in targeted groups for any reason. The district court held that the Recruiting Rule violated the First Amendment both facially and as applied. CP 37-58-B. In reversing, the Sixth Circuit held that the regulatory conduct of TSSAA in formulating and implementing the Recruiting Rule did not constitute state action. CP 7-18-A.

The Recruiting Rule. The Recruiting Rule prohibits the use of "undue influence" on a student or the parents or guardians of a student "to secure or retain a student for athletic purposes." The term "undue influence" is defined as "exceeding what is appropriate or normal." CP 6-B.

The terms "appropriate or normal" are not defined. *Id.* at 37-B. Instead, the Recruiting Rule sets forth a number of examples of conduct that constitutes "undue influence" per se. These per se rules bar independent schools from taking the initiative in communicating with or contacting prospective student-athletes individually or in a targeted group for any reason. *Id.* at 6-10-B, 37-40-B. The district court found that the Recruiting Rule's "ban has the effect of preventing any influence on a student, not just 'undue' influence." (emphasis in original). *Id.* at 48-B.

Since the prohibition on initiating contact applies to students "with or without an athletic record," *id.* at 6-B, private schools are at risk if they initiate contact with any prospective students individually – even those without an athletic record – in case those students should, if they enroll, subsequently decide to participate in interscholastic athletics.

That risk can only be obviated if the school is willing to bar such students from interscholastic athletics. Such a broad policy would be unfair to students and detrimental to the mission and competitiveness for students of an independent school such as petitioner.

Contact with prospective students may not be initiated "by any person connected, or not connected, with the school." *Id.* Private or parochial schools may not contact students enrolled at the public schools, and public schools may not contact private school students. *Id.* at 39-40-B. A broad exception to the ban on contact applies when either public or private schools contact "feeder" schools;[1] with respect to these "feeder" schools, far-reaching initial and targeted contact is permitted so that recruiting can take place essentially without restraint. As a practical matter, this "feeder pattern" exception does not typically apply to private schools, such as petitioner. *Id.* TSSAA has "not explained the purpose for the feeder school exception."[2] *Id.* at 47-48-B.

The Recruiting Rule Violation. The district court held the Recruiting Rule unconstitutional on its face and as applied. The "as applied" violation stemmed from a letter sent in April 1997 by petitioner's head football coach to all new incoming male students. *Id.* at 13-B. The letter was purely informational; it set forth the dates in May for spring football practice and invited the students to attend if interested. The letter was sent only to new students who had already applied, had been accepted for admission, and had signed a contract to attend petitioner the next fall. *Id.* The letter was followed by a telephone call to the parents of each of the students to

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[1] A "feeder pattern" exists where a middle school sends a large number of students to a particular high school each year. The term "feeder pattern" is not defined in the TSSAA rules. CP 40-B.

[2] The district court made the following observation about the "feeder pattern" exception: "If conveying information to student-athletes about opportunities to attend out-of-zone schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of 'feeder schools.' The TSSAA cannot have it both ways." *Id.* at 47-48-B.

reaffirm that participation in spring practice was entirely optional. *Id.* at 14-B. The students who received the letters were entering high school and, therefore, had to change schools as they were graduating from middle school.

TSSAA regulations allow the students who received the letters and whose parents received the calls to participate in spring practice. Sending the letters and making the telephone calls, however, constituted a Recruiting Rule violation. In other words, it was legal for the incoming students to participate, but illegal for the school to communicate with them about practice. The specific language of the communications was not determinative of the violation. The communications themselves constituted "initial contact ... by a member of the coaching staff or representative of the school" and therefore "undue influence" on the contacted students. *Id.* at 12-13-B.[3]

Despite finding that there was "no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials," TSSAA placed the school's entire athletic program on probation for four years, suspended the football and boys' basketball programs from TSSAA playoffs for two school years (1997-1999), and imposed a $3000 fine. *Id.* at 17-18-B & n.1.

The TSSAA

Role and Mission. The purpose of TSSAA, as set forth in its Constitution, is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." JA-87. It has no other independent role or function.

TSSAA recognizes that it has an integral role in Tennessee's public and private secondary school educational process. TSSAA acknowledges that "the primary objective of

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[3] TSSAA found petitioner to have committed two other rules violations. One involved petitioner's alleged failure to monitor the provision of free tickets to a Brentwood Academy football game to two prospective students by an unaffiliated middle school coach. The other involved an alleged violation of the off-season practice rule. JA-114-15, 281-83. Neither of these claimed violations is directly at issue at this stage of the litigation.

all secondary schools is to educate youth" and that education encompasses both athletic and scholastic components. As poignantly stated in TSSAA's Constitution, "[t]he athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work." While the "athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other." TSSAA "aims to co-ordinate the athletic and scholastic programs" of Tennessee's public and private secondary schools. *Id.*

Composition and Governance. Like comparable organizations in other states, TSSAA is a nominally private association of public, independent, and parochial secondary schools from across Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools comprise 84% of the voting membership; independent and parochial schools comprise 16% of the voting membership. JA-23, ¶12.

With the exception of a few schools that concentrate on special education, JA-214, all public high schools in Tennessee (those that participate in interscholastic athletics) are members of TSSAA. JA-217. As the district court found, TSSAA's "rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics." CP 32-B "TSSAA admits it is the only organization providing these benefits to the public secondary schools in Tennessee." *Id.* at 28-B & n.7. Employees of TSSAA, including Executive Director (and defendant) Carter, are covered by the state retirement system, and, by statute, are included in the definition of "teachers" for that purpose. T.C.A. §8-35-118; CP 33-B.

TSSAA's administrative authority lies with a Board of Control. TSSAA rules and regulations are enacted by a Legislative Council. Both the Board of Control and the Legislative Council are nine-member bodies elected by popular vote in each of nine electoral districts. Eligibility for

election to both bodies is based on official status and is limited to high school principals, assistant principals, or qualified superintendents. JA-89, 92; CP 5-B. Public high school administrators who serve on the Legislative Council and the Board of Control attend the meetings as part of their official duties – *i.e.*, on school time when the meetings occur while school is in session – and typically receive reimbursement for expenses from their schools for attendance at meetings. JA-39-40, 298.

"All members of the Legislative Council [and the Board of Control] must be principals or superintendents," although an assistant principal "who devotes full time to administrative duties" is also eligible to serve. JA-89, 92. The election of members of the Board of Control and the Legislative Council takes place at an annual meeting. Each member school within the district is entitled to one vote, provided that the school is "represented at the [annual] meeting by the principal, or other faculty member." *Id.*

When petitioner was disciplined, all the voting members of the Legislative Council and the Board of Control were public school administrators, JA-24, ¶15, and therefore public employees.

Regulatory Function. TSSAA's very purpose – and its sole function – is to "regulate the athletic relations of the secondary schools in Tennessee." JA-87. As the district court found,TSSAA's "very existence is entirely dependent upon the absolute cooperation and support of the public school systems of the State of Tennessee." CP 35-B. (internal quote omitted).

Member schools must, in effect, qualify under Tennessee's compulsory education law and pay annual dues. JA-40, 98-99. A substantial portion of TSSAA's annual revenue comes from receipts for TSSAA football and basketball championship tournaments. JA-40, ¶24. Many of the athletic contests between member schools are played in state-owned facilities or on state-owned properties. *Id.*

TSSAA exercises regulatory power in determining what schools the public schools of Tennessee may compete against in interscholastic athletics. As the district court found, TSSAA's "rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics." CP 32-B. TSSAA can "suspend, ... fine, or otherwise ... penalize any member school for the violation of any" TSSAA rule or, more generally, "for other just cause." JA-100.

Under Article III, Section 1 of TSSAA's by-laws, member schools may only play or scrimmage against schools approved by TSSAA. JA-126-28. This effectively gives authority to TSSAA to set criteria and to approve or disapprove interscholastic athletic opponents for all public high schools in the state with interscholastic athletic teams.

TSSAA rules blanketly allow member schools to play or scrimmage against other TSSAA members. TSSAA allows member schools to play non-member high schools if those schools qualify under the state's compulsory attendance law, provided that the TSSAA Executive Director approves in writing. JA-127. No standards exist to guide the discretion of the Executive Director in the exercise of his approval power. A public school seeking to play a non-member private school must therefore secure case-by-case approval by TSSAA's Executive Director, whose discretion to approve or disapprove such contests is not subject to written standards or criteria. Similarly, a non-member private school cannot schedule a game against a public school without the specific written approval of TSSAA's Executive Director. *Id.*

That TSSAA regulates schools in their official capacity is apparent.[4] For example, a school seeking reinstatement after suspension must have its "principal and the Board of Education ... agree in writing that the school will abide by all the rules of [TSSAA] in the future." Not only the principal

[4] TSSAA also regulates non-school activities of individual students. For example, a student eligible to play in TSSAA-sanctioned activity is effectively barred from participating in a church, synagogue, or YMCA league. JA-107-08.

but "each member of the Board of Education shall sign the statement."[5] JA-100.

For a school to be a member of TSSAA, its coach must have a Tennessee state teaching license, must be a full-time employee of the Board of Education, and must be paid entirely from funds approved by the Board of Education or the governing body of the school. CP 33-B.

Under TSSAA rules, it is the duty of the host school to provide "sufficient security to insure orderly conduct on the part of all spectators." Schools "are responsible for the conduct of their own fans and students at every athletic contest, regardless of where it may be held." JA-137.

Further, the role of a school's principal in TSSAA is one that involves that principal in his or her official capacity as administrative head of the school. It is the principal of each school who is responsible to TSSAA "in all matters pertaining to the athletic relations of his school." JA-138. That is, the principal or the "administrative head" of a school is held responsible for the school's "observance of TSSAA regulations." *Id.*

The Regulation of Education in Tennessee

The Duty of the State to Provide Free Education Through Public Schools. The Tennessee Constitution guarantees school children the "right to a free public education," *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993), and imposes on the state a duty to "provide for the maintenance, support and eligibility standards of a system of free public schools." Article XI, Section 12. That state duty

[5] A flavor of the sweep of regulation can be gleaned from the Transfer Rule, JA-109, and the Residence Rule. JA-113. These rules present special challenges for a student whose parents move to a new community (all transfer students must be "approved by the Executive Director" before being allowed to participate, JA-109-10), a student whose parents divorce, and a student facing partial-year custody with a non-parent guardian such as a grandparent (such an arrangement could result in total ineligibility for a student's entire high school years).

cannot be avoided by delegation to local governments. *McWherter*, 851 S.W.2d. at 156.

Tennessee law requires that "[t]here shall be a local public school system operated in each county or combination of counties. There may be a local public school system operated in a municipality or special school district." T.C.A. §49-1-102(c). There is also a provision for a "local board of education" and a "superintendent or director." *Id.*

Salaries of teachers are set at the discretion of the local board of education. T.C.A. §49-6-1002(c). "There is no certification of coaches, as such, in Tennessee." *White v. Banks*, 614 S.W.2d 331, 332 (Tenn. 1981). However, teacher/coaches typically receive salary supplements for their role as coach through contractual agreements with the school or school district. *Id.* Complaints about athletic success are directed at public educational officials. The perception of the schools' local constituents is that school officials are responsible for and accountable for athletic success. *See Warren v. Polk County Bd. of Educ.*, 613 S.W.2d 222, 222-23 (Tenn. 1981).

Decisions about a public school's athletic program are within the overall jurisdiction of local public school officials and constitute part of the administration of the overall public educational program. Local public school officials are responsible for maintaining an appropriate balance in the use of school time between the athletic and non-athletic components of education. For example, it is unlawful for a public school principal or teacher to dismiss students during regular school hours to play a sports game "without written permission from the governing board of the institution." T.C.A. § 49-6-1002(a). Thus, control over the allocation of time for playing or practicing for interscholastic sports remains with local public school authorities as part of their overall educational responsibility.

The Duty of Parents to Have Their Children Attend School. Tennessee has a compulsory school-attendance law. The state imposes a duty on parents or others responsible for

raising a child aged six through seventeen to "cause such child or children to attend public or non-public school." T.C.A. §49-6-3001(c)(1). A "public school" is "any school operated by a local education agency ... with public funds." T.C.A. §49-6-3001(c)(3)(B). A non-public school can be a "church-related school, home school, or private school." T.C.A. §49-6-3001(c)(3)(A). To qualify as a "private school," a school must be approved by the state or accredited by an organization approved under rules promulgated by the State Board of Education. T.C.A. §49-6-3001(c)(3)(A)(iii).

The Role and Conduct of the State Board of Education. Under Tennessee law, the State Board of Education (SBE) has authority to develop and maintain a "master plan for the development of public education, kindergarten (K) through grade twelve (12)," to set licensing standards for public school teachers and administrators, to set graduation requirements, and to set policies governing curricula and courses of study. T.C.A. §49-1-302(a)(4), (5), (6), (8). In addition, the SBE has authority to promulgate rules for state approval of accrediting bodies that certify "private schools" to qualify under the state's compulsory attendance law. T.C.A. §49-6-3001(c)(3)(A)(iii).

SBE has adopted various curriculum frameworks to provide the "basis for planning instructional programs in each local school system." SBE Rule 0520-1-3-.05 (JA-220). These "contain broad goals and objectives which identify the minimum content required at each grade level and for each course." One such framework focuses on physical education. SBE Rule 0520-6-10-.01 *et seq.* (JA-250). The rationale for instruction in physical education in high school is that it helps "achieve the lifetime goal of personal fitness." *Id.* at 6-10-.03 (JA-252). Participation in games and organized sports is a "strand" in SBE's physical education curriculum, *id.* at 6-10-.04 (JA-252), with the "concept" being that "[i]ndividuals enjoy team sports as participants and spectators," and learn "[t]o understand rules and strategies employed in games/sports." *Id.* at 6-10-.06 (JA-254).

Courses in physical education may be offered for credit towards graduation from high school as part of a high school's "[a]cademic program." Under SBE guidelines, "[p]articipation in interscholastic athletics ... may be substituted for the physical education requirement" for graduation "in accordance with local board of education policies." *Id.* Thus, as the district court found, "students get academic credit for TSSAA activities." CP 34-B.

SBE has established criteria for approval of non-public school accrediting agencies. Rule 0520-7-2-.03 (JA-255). One requirement is that such an agency publish and follow minimum standards regarding "curriculum and graduation" when accrediting private schools. One required minimum curriculum standard is that the "program shall include ... physical education." *Id.* at 0520-7-2-.03(6)(c)(9)(i)(I) (JA-258). Thus, a private school seeking to qualify under Tennessee's compulsory attendance law by receiving accreditation from an agency approved by SBE must include a program in physical education.

Public schools transport students to school-sponsored events such as interscholastic athletic contests. State law contemplates this and authorizes local school authorities to use "vans" on contract with private vendors to transport students "to and from an interscholastic athletic or other interscholastic or school sponsored activity." T.C.A. §49-6-2116. SBE guidelines limit the use of "[v]an type equipment" to "transport not more than 15 students to and from interscholastic athletic and other interscholastic or school sponsored activities." SBE Rule 0520-1-5-.02 (JA-246).

The Relationship Between SBE and TSSAA. Since 1925, SBE has recognized the function of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee. CP 10-B. In 1972, by rule, SBE officially designated TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." *Id.* at 23-B. The SBE also

determined that the SBE "Chairman ... shall designate a person or persons to serve in an ex-officio capacity on the [TSSAA] Board of Control and Legislative Council." *Id.*; JA-211. The district court found that SBE representatives "attended more than twenty TSSAA Board of Control or Legislative Council meetings from 1990 through 1997." CP 34-B; JA-177-98.

In 1972, SBE approved the then-current rules and regulations of TSSAA (including the Recruiting Rule) and reserved the right to review and approve the appropriateness of future changes, a power it regularly exercised. CP at 10-11-B, 24-26-B. SBE viewed TSSAA as "the agency [designated] to govern secondary athletics for the Board," *id.* at 24-B, reaffirming "the Board's decision to delegate responsibility for management of secondary school athletics to TSSAA." *Id.* at 25-B.

In sum, SBE has long recognized that "TSSAA works as an agent on behalf of the State Board of Education." *Id.* SBE's Executive Director noted that "[c]ompetitive athletics is a big part of the high school experience" and that TSSAA "manages these activities as sanctioned by the State Board of Education." *Id.* at 25-26-B.

In 1995, apparently in response to court cases holding TSSAA's regulatory conduct to be state action, JA-173, SBE adopted the following rule: "[SBE] recognizes the value of participation in interscholastic athletics and the role of [TSSAA] in coordinating interscholastic athletic competition. [SBE] authorizes the public schools of the state to voluntarily maintain membership in [TSSAA]." CP 26-B.

Under the 1995 revision, SBE no longer "designate[d]" TSSAA as the official organization for supervision and regulation of secondary school athletics but instead "recognize[d]" TSSAA's long-held role as being of "value." Further, the 1995 revision singled out TSSAA by name to serve in the same role it had traditionally played. The district court (CP 26-27-B) found that even after the 1995 revision:

> the conduct of the parties has not materially changed.... [T]he connections between TSSAA and

> the State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed. In short, the rule amendment had no material effect.... Tennessee, through custom and practice, then explicitly, and then through custom and practice again, has recognized TSSAA as the official body for the regulation and control of interscholastic athletics. A mere change in the words of the regulation, apparently to avoid a litigation claim of state action, did not change the actual conduct of the State and did not change the actual conduct of the TSSAA....

The Proceedings Below

The district court found the Recruiting Rule unconstitutional, both on its face and as applied, as a violation of the First Amendment right of expression and enjoined its enforcement. 13 F. Supp.2d 670. The Sixth Circuit reversed, holding that the SBE's revocation of its official designation of TSSAA to regulate and organize interscholastic athletics negated TSSAA's status as a state actor. 180 F.3d at 763-66.

Further, the Sixth Circuit held that it was not bound by this Court's "comments" in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), which it deemed not to be "controlling." 180 F.3d at 766. In *Tarkanian*, this Court noted that the regulatory conduct of a high school athletic association whose "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign" would be state action. That situation "of course" contrasted with a national association such as NCAA whose decisions could not fairly be attributed to a single state (in that case Nevada).

Despite the fact that this Court in *Tarkanian* footnote 13 approvingly cited two high school athletic association cases in which those associations were held to be state actors, and even though one of those cases involved a private school claiming racial discrimination on the part of the association, the Sixth

Circuit held that footnote 13 did not apply when a high school athletic association such as TSSAA dealt with a private school such as petitioner. *Id.*[6]

In a subsequent case arising in the Sixth Circuit and raising very similar issues regarding the state-action status of the regulatory conduct of a high school athletic association, a district court refused to follow the Sixth Circuit decision herein under review. *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d 729 (W.D. Mich. 2000).[7] The district court was convinced that the Sixth Circuit's decision in the *Brentwood Academy* case was so at odds with this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), as to place the district court at risk of violating its duty to this Court's primacy in our judicial hierarchy.

The court in *Communities for Equity* found such a "serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*," 80 F. Supp.2d at 742, that it could not follow *Brentwood Academy* and still be faithful to this Court's decision in *Tarkanian*. According to the *Communities for Equity* court, the "Sixth Circuit's decision in *Brentwood Academy* misstates the Supreme Court's reasoning in *Tarkanian* [footnote 13]," *id.*, and for that reason it was deemed "not controlling." *Id.* The court followed *Tarkanian* footnote 13 and not "the *Brentwood Academy* decision ... [which] cannot be reconciled with Footnote 13 in *Tarkanian*...." *Id.*

PRELIMINARY STATEMENT

"Extracurricular activities" in general and interscholastic athletics in particular "are an important component of an

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[6] The Sixth Circuit rejected a petition for rehearing *en banc* "[a]lthough a substantial minority of the active judges ... voted for en banc review...." 190 F.3d at 706 (Merritt, J., dissenting).

[7] The district court decision in *Communities for Equity* is reprinted as Appendix A to petitioner's Reply to Respondents' Brief in Opposition.

education in today's modern society." *Barnhorst v. Missouri State High Sch. Activities Ass'n*, 504 F. Supp. 449, 457 (W.D. Mo. 1980). This is hardly a recent insight as the ancient proverb *mens sana in corpore sano* (a sound mind in a sound body) attests specifically regarding the relationship between athletics and education. Athletics keep your mind fit, help motivate, and teach values. That is why they are part of a well-rounded K-12 curriculum. Public school officials have jurisdiction over athletics. See T.C.A. §49-6-1002(a)(appropriate allocation of school time between athletics and other components of education is the responsibility of public school officials). These same public officials control TSSAA.

In a submission to the Sixth Circuit, Chester E. Finn, Jr. and Daniel Casse, nationally recognized education and public policy experts, asserted that "[e]xtracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds." CP 10-E. They noted the importance of motivation in the educational process, concluding that "like art, drama, and journalism," athletics "can provide the motivation to learn," serving as the "hook to get the attention of students and rivet it on the core curricular mission of the schools." While athletes may stay in school because of their interest in sports, "learning and the pursuit of knowledge can be infectious." *Id.* at 11-E.

SBE has recognized that "[c]ompetitive athletics is a big part of the high school experience. . . .TSSAA manages these activities as sanctioned by the [SBE]." CP 25-26-B. Under state law, participation in interscholastic athletics may be substituted for the physical education graduation requirement. Thus, students get academic credit for TSSAA-regulated activities. *Id.* at 34-B. In addition, any private school seeking accreditation by an agency approved by SBE (under SBE Rule 0520-7-2-.03 [JA-255]) must include a program in physical education. One of the minimum curriculum standards for

accreditation is that the "program shall include ... physical education." *Id.* at 0520-7-2-.03(6)(c)(9)(i)(I) (JA-258).

The district court concluded that "interscholastic athletics are intricately connected to the educational process," CP 33-B, and that there is a "close identification" of TSSAA with the State's "provision of education." *Id.* at 36-B. TSSAA acknowledges as much in its Constitution: "The athletic field and the gymnasium are classrooms" for "teaching ... character, integrity, sportsmanship, and team work." TSSAA "aims to co-ordinate the athletic and scholastic programs" of Tennessee's secondary schools, recognizing that the "physical" and "mental" components of education "complement[]" each other. *Id.* at 33-B. And responsibility for the overall educational program rests with Tennessee's public high schools and their principals, who control TSSAA.

A. State Action in Precedent: The Lower Appellate Courts

The Sixth Circuit's decision is out of sync with this Court's footnote 13 in *NCAA v. Tarkanian*, 488 U.S. at 193 n.13, and with every other appellate court to decide the state-action status of the regulatory conduct of high school athletic associations. Affirmance of the decision of the Sixth Circuit herein would unsettle and destabilize uniformly settled law.

As Judge Merritt concluded in his dissent to the denial of the petition for rehearing *en banc*, the decision of the Sixth Circuit below is "inconsistent with" this Court's *Tarkanian* footnote 13. 190 F.3d at 707. The court in *Communities for Equity* stated the same conclusion more pointedly: there is a "serious disconnect" between *Tarkanian* footnote 13 and the decision below, the "Sixth Circuit's decision in *Brentwood Academy* misstates [and "misapplies"] the Supreme Court's reasoning in *Tarkanian* [footnote 13]," and the decision under review herein "cannot be reconciled with Footnote 13 in *Tarkanian*." See *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d at 742-43. Without exception, every other case that mentions *Tarkanian* footnote

13 has concluded that, under it, the regulatory conduct of a nominally private high school athletic association constitutes state action.[8]

The Sixth Circuit's state-action holding "contradicts the uniform case law in the field from other circuits and is inconsistent with the clearly established constitutional theory of state action." 190 F.3d at 706 (Merritt, J., dissenting). At no stage of this litigation has TSSAA cited appellate authority from outside the Sixth Circuit holding a high school athletic association not to be a state actor.

Judge Merritt correctly stated in his dissent that the state action holding in this case is inconsistent with the explicit state action doctrine on this issue from the Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits.[9] It is also

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[8] *See Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d 729, 742-43 (W.D. Mich. 2000)(finding that the regulatory conduct of a high school athletic association constituted state action); *Brewer v. Purvis*, 816 F. Supp. 1560, 1574-75 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir. 1995), *cert. denied*, 514 U.S. 1111 (1995) (holding that "an athletic association whose membership is predominated by institutions created by the same sovereign is a state actor"); *Libby v. The South Inter-Conference Ass'n*, 728 F. Supp. 504, 506-07 (N.D. Ill.), *aff'd*, 921 F.2d 96 (7th Cir. 1990) (same); *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting from holding but agreeing that *Tarkanian* footnote 13 requires a finding of state action); *Bingham v. Oregon Sch. Activities Ass'n*, 37 F. Supp. 2d 1189, 1192-93 (D. Ore. 1999); *Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690, 696 (N.D. Tex. 1998); *Jordan v. Indiana High Sch. Athletic Ass'n*, 813 F. Supp. 1372, 1377 (N.D. Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994); *Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Indiana High Sch. Athletic Ass'n v. Schafer*, 598 N.E.2d 540, 547-50 (Ind. Ct. App. 1992).

[9] See *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121, 125 (3d Cir. 1978) ("[T]he parties concede that ... state action is present"); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-28 (5th Cir. 1968) ("There can be no substantial doubt that conduct of the affairs of LHSAA is state action" and the nominally private status of LHSAA "cannot obscure the real and pervasive involvement of the state in the total program") (cited approvingly in *NCAA v. Tarkanian*, 488 U.S, 179, 193 n.13 (1988)); *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) (though like TSSAA a

inconsistent with controlling doctrine in the Fourth[10] and Eleventh[11] Circuits. Further, the decision of the Sixth Circuit in this case conflicts with all state supreme court decisions that have addressed the question, which, as Judge Merritt observed, "have held that their high school interscholastic athletic associations are state actors."[12] *Id.*

Indeed, recent cases from outside the Sixth Circuit have treated the state action status of high school athletic

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"voluntary association," IHSA had an "overwhelmingly public character" because of the public character of its membership); *In re United States ex rel Missouri State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (MSHSAA rules were state action because of nature of its composition); *Brenden v. Independent Sch. Dist. 742*, 477 F.2d 1292, 1295 (8th Cir. 1973) (integral involvement of member public school districts in League's decisionmaking process constituted state action); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (AIA a state actor because the "member public schools play a substantial role in determining and enforcing the policies and regulations of the AIA" and because the AIA "rulemaking procedure integrally involve[d] the member schools and school districts in the decision making process") (cited approvingly in *NCAA v. Tarkanian*, 488 U.S at 193 n.13).

[10] Virginia's role in administering its analogous high school athletic association is even more explicit than was the case in the other circuit cases. *See O'Connell High Sch. v. The Virginia High Sch. League*, 581 F.2d 81, 83 (4th Cir. 1978) (parties stipulated to existence of state action).

[11] The Eleventh Circuit adopted as binding the established precedent of the Fifth Circuit prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). Prior to that date, the Fifth Circuit had held that the regulatory conduct of a high school athletic association comparable to TSSAA was state action. *See supra* note 9. The state action status of the regulatory conduct of a high school athletic association is settled in the Eleventh Circuit. *See Brewer v. Purvis*, 816 F. Supp. 1560, 1575 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir. 1995), *cert. denied*, 514 U.S. 1111 (1995) (noting that "[t]raditionally, courts have found that high school athletic associations are state actors").

[12] *See Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Public High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996); *Mississippi High Sch. Activities Ass'n, Inc. v. Coleman*, 631 So.2d 768, 773-74 (Miss. 1994); *Kleczak v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 735-36 (R.I. 1992); *Israel v. West Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 484 & n.4 (W. Va. 1989).

associations as clearly established settled law: "Actions of voluntary interscholastic associations, of which public schools comprise part of the membership, constitute state action." *Dennin v. The Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996).[13] Therefore, affirming the Sixth Circuit in this case would unsettle law that has been uniformly settled for over thirty years,[14] creating instability.

B. State Action in Theory: Protecting A Bona Fide Private "Area of Individual Freedom"

This Court has explained that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982). The concern about protecting an autonomous private realm has no place where, as here, no bona fide private organization or private realm exists. Applying constitutional principles to TSSAA's regulatory conduct endangers no "area of individual freedom".

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[13] *See also Robbins v. Indiana High Sch. Athletic Ass'n*, 941 F. Supp. 786, 791 (S.D. Ind. 1996) ("The IHSAA is an organization whose very existence is entirely dependent upon the absolute cooperation and support of the public school system of the State ... and is subject to constitutional scrutiny as a state actor...."); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Public High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996) ("Preliminarily, everyone agrees that the actions of Section VI constitute state action....").

[14] The Sixth Circuit did not refer to any of this case-law from other circuits. Judge Merritt noted that he "could find no circuit or state supreme court decision supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts." 190 F.3d at 706-07. The Sixth Circuit also cast aside earlier circuit precedent, including cases implicitly acknowledging TSSAA's state-action status, because those cases pre-dated the so-called *Blum* trilogy and were therefore "supercede[d]" [sic]. 190 F.3d at 706. But *Tarkanian* and all cases following it were decided well after *Blum* was handed down. And no other circuit has thought that *Blum* required reconsideration of its precedent in this area. The state-action status of the regulatory conduct of high school athletic associations has been regarded as settled law both before and after *Blum*.

Maintenance of a public realm, subject to the Constitution, and a private realm, beyond the scope of constitutional scrutiny, permits "citizens to structure their private relations as they choose" without constitutional accountability. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991). It also "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936.

The state-action concern about preserving "an area of individual freedom" beyond the scope of constitutional scrutiny assumes that the organization whose activity is under challenge is "private" – *i.e.*, that a "private party has taken the decisive step that caused the harm to the plaintiff." In such situations, "the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *NCAA v. Tarkanian*, 488 U.S. at 192.

In that typical case, the "private" entity is controlled and governed by private parties[15] and has a "private" character and mission. In the performance of that independent mission, the "private entity performs a function which serves the public." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). By itself,

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[15] *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (noting that the entity whose conduct was challenged "was a heavily regulated privately owned utility" whose private character absent government regulation was undisputed; defendants were self-evidently private parties); *See also American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 985-86 (1999) (noting that all parties agreed that "the *public officials* responsible for administering the workers' compensation system ... are state actors" but holding that a "*private insurer's* decision to withhold payment for disputed medical treatment" was not fairly attributable to the state)(emphasis in original); *Blum v. Yaretsky*, 457 U.S. 991, 1008 & n.19 (1982) (holding that "medical judgments made by private parties according to professional standards that are not established by the State" are not fairly attributable to the state, even in context of public benefits program such as Medicaid, and noting that the medical judgments were "made by concededly private parties"); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (noting that, in a constitutional challenge to a warehouseman's sale of goods under the Uniform Commercial Code, "no public officials" were named as defendants).

the performance of a public function by a private entity does not constitute state action. *Id.* The goal of state-action analysis in such cases is to determine "where the governmental sphere ends and the private sphere begins." *Edmonson*, 500 U.S. at 620.

But this assumes that, with respect to the conduct or to the entity under challenge, there is, to begin with, a "private" sphere ("an area of individual freedom") warranting preservation. Such an assumption is, however, unfounded in the present case, in which a critical threshold question is whether TSSAA can fairly be characterized as in the "private sphere" in the first place. *Cf. Lebron v. National Railroad Passenger Ass'n.*, 513 U.S. 374, 378 (1995) (Amtrak "not a private entity but Government itself" for First Amendment purposes). There is no constitutional interest in shielding from constitutional scrutiny ostensibly "private" conduct that is in reality governmental in character.

TSSAA is organized, controlled and governed by public entities and by public officials acting ex officio. *See West v. Atkins*, 487 U.S. 42, 49-50 (1988)("[G]enerally, a public employee acts under color of state law while acting in his official capacity"). TSSAA pursues "governmental objectives," *Lebron*, 513 U.S. at 400, by exercising regulatory authority over an important component of Tennessee's educational system – interscholastic athletics. See Petition for Writ of Certiorari at 18-19 & Appendix E (submission of Chester E. Finn, Jr. and Daniel Casse). TSSAA is not a private organization structured by private parties unrelated to the state or local governments. It is not a privately owned and operated institution that sells services to the state. Nor is it a private company with a private board and a nongovernmental character whose relationship with government is limited to a commercial interaction such as the sale of services.[16] Rather, TSSAA is primarily composed of, controlled by,[17] and

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[16] *Contrast Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (privately owned nursing home with state Medicaid contract not a state actor).

[17] See notes 32-35 and accompanying text, *infra*.

exclusively governed by public entities and public officials whose single mission is the regulation of interscholastic athletics of Tennessee's schools.

The "proscription on state action applies de facto as well as de jure." *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974). The protection of a private realm beyond constitutional scrutiny does not extend to "sham arrangement[s]" that attempt to disguise as "private" governmental conduct carried out by public officials. *See Rendell-Baker*, 457 U.S. at 842 n.7. Where challenged conduct is performed by public employees acting in their official capacity, as herein, that conduct is presumptively state action. *West*, 487 U.S. at 49-50. [18]

The state-action status of entities does not turn on an organization's self-description. It is the "nature" of an organization that "determin[es] the constitutional rights of citizens affected by its actions," *Lebron*, 513 U.S. at 392, not the "labeling of an activity." *Mistretta v. United States*, 488 U.S. 361, 393 (1989).[19]

This principle applies to hollow formalistic transfers of authority from public to nominally private officials.[20] And it

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[18] As a general principle of state-action doctrine, "a public employee acts under color of state law while acting in his official capacity." *West v. Atkins*, 487 U.S. at 50. *See infra*, Argument Section I.A.2; *Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957), *infra* note 32.

[19] *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267-69 (1991)(where Board of Review with power to veto decisions of airport authority is composed of "members of congressional committees charged with authority over air transportation," separation-of-powers issues are implicated, even if the "Members of Congress ... serve on the Board nominally 'in their individual capacities'" because constitutional status "does not turn on the labeling of an activity" but on the functional realities and on who controls actual selection)(internal quote omitted).

[20] *Evans v. Newton*, 382 U.S. 296, 301 (1966); *accord, Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) (nominal transfer of control of a park from public to private trustees "had not ... eliminated the actual involvement of the city" and therefore did not change the state-action status of the park there in question).

applies to the use of other "sham arrangement[s]" such as delegation[21] or use of the corporate form by public officials. Neither state nor federal government may "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron,* 513 U.S. at 397.

As a private school with a religious tradition, petitioner surely endorses the fundamental constitutional distinction between private conduct and conduct by or fairly attributable to the government – a distinction that allows schools such as petitioner to survive and thrive. But a concern about preserving an "area of individual freedom" has relevance only if the conduct at issue is "fundamentally a matter of private choice and not state action." *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting).

Such a concern about protecting an autonomous private realm has no place in the context of this case where no bona fide private organization or private realm exists. Here, public officials under the umbrella of TSSAA act collectively and in their official capacity; they pursue a governmental regulatory objective in governing an integral part of the state's system of public education – interscholastic athletics (and, indeed, TSSAA has no independent "private" non-regulatory purpose or character); they regulate schools directly and definitively, and, in so doing, they inhibit private conduct – school choice – by suppressing the First Amendment rights of private schools to inform prospective students about the advantages and opportunities available at private schools. See CP 46-B. Under the circumstances, regulatory decisions of TSSAA do not reflect "the exercise of private choice," *Lebron*, 513 U.S.

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[21] For example, government cannot avoid its constitutional accountability by delegating to private parties the provision of services that a state's "constitution or statutory scheme obligates the State to provide." *American Mfrs. Mut. Ins. Co., v. Sullivan*, 119 S. Ct. 977, 988 (1999). Otherwise, the state could "contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied." *West v. Atkins*, 487 U.S. 42, 56 n.14 (1988)(internal quote omitted).

at 412 (O'Connor, J., dissenting), and therefore do not warrant the constitutional shield of private status.

C. The School Choice Concern

TSSAA's Recruiting Rule substantially restricts the ability of independent and parochial schools to seek out students by informing them of educational opportunities. It also makes it more difficult for students and parents to learn about alternative educational options, including financial aid.

TSSAA's Recruiting Rule far transcends the athletic context since it applies to athletes and non-athletes alike and restricts both school representatives and unaffiliated persons. Unless an independent school is willing to avoid interscholastic athletics or to ban students it recruits generally from interscholastic athletics, it (and the potential students) are compromised. This blow against school choice is struck on behalf of the state by public school officials who join together to form an association the Sixth Circuit deemed private but in reality is governmental in nature, exercising regulatory authority over interscholastic athletics for the entire state. By implementing the various bans on student recruitment – and focusing on students with and without an athletic record – TSSAA is limiting opportunity, not guarding against "undue influence."

A problem with public education has been the occasional mind-set that the public schools have a proprietary interest in the students of a community. But government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships even at the expense of the child's overall welfare. Students are not objects for use by the state to achieve communal goals.[22]

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[22] Cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), teach that the liberty of the student and the student's family is the appropriate unit of concern and is afforded constitutional primacy. Government cannot constrain what a student learns. Parents, not the state, ultimately control the nature and scope of educational

Maintaining a competitive balance in athletics does not justify suppressing speech and thereby restricting educational opportunity for students.[23]

In the current context, TSSAA, as agent of and on behalf of state and local government, has apparently determined that independent schools pose a threat to public education. Rather than viewing independent schools as a means of enhancing educational options available to the students of the state – placing more choices on the educational menu for students and their families – TSSAA has sought to circumscribe and even foreclose opportunities for many youngsters who may not be aware of independent school alternatives or who may mistakenly believe that independent school enrollment is financially unattainable.

Instead of acting in the students' best interests by encouraging communication about educational opportunities, TSSAA views students as a means to an end – a championship for a public school team – and disrespects the primacy of student and family choice in education. TSSAA flatly bars any independent school from "contact[ing] students enrolled at the public schools." CP 39-B. TSSAA assumes that it is appropriate and desirable to establish and maintain a sort of Berlin Wall around public school students, ostensibly protecting them against the undefined use of "undue influence," but in reality inhibiting parents and students from learning about educational options they have a right to discover and embrace. The state-action decision of the Sixth

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opportunity for children, at least outside the public school curriculum. There are limits to how far states can go "to foster a homogeneous people." 262 U.S. at 402. When Oregon required all students to attend public schools, this Court pointedly observed that "[t]he child is not the mere creature of the State" and that the state had no "general power ... to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535.

[23] For further elaboration of these points, see Petition for Writ of Certiorari at 11-14.

Circuit allows public school officials to effectuate that objective without constitutional accountability.[24]

D. The Accountability Concern

Under the Sixth Circuit's decision, the regulatory conduct of a high school athletic association is not subject to constitutional scrutiny. Claims of race, sex, or religious discrimination would be constitutionally unreviewable.

This is particularly troublesome because TSSAA and comparable organizations have a track record that raises concerns about the lack of accountability. This includes such things as retaliatory conduct,[25] racial segregation,[26] unreasonable refusal to waive rules adversely affecting

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[24] The district court held that TSSAA "does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." CP 46-B. Indeed, the "State's interest. . .is the reverse. The State has a profound interest in students making informed choices about education." *Id.* at n.18. Thus, "it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side. . .by suppressing the speech of the other. . . . TSSAA cannot control school choice through censorship." CP 46-B.

[25] In *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990), a student with a disability transferred schools to receive a free appropriate public education to which he was entitled under federal law. TSSAA's transfer rule barred the student from participating in interscholastic athletics, and TSSAA was unwilling to waive that rule. A federal court ordered the school to admit the student and to allow him to play interscholastic athletics. When the district court's injunction was vacated on procedural grounds, TSSAA in retaliation ordered the school to forfeit all games in which the student had played, "as well as all championships and trophies, which resulted from those games." *Id.* at 756 The court barred that forfeiture on the ground that TSSAA could not penalize the public high school for obeying a federal court order. *Id.* at 760-61, *aff'd.*, 1990 U.S. App. LEXIS 12511 at *10-11 (6th Cir. 1990).

[26] *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968).

students with a disability,[27] and refusal to allow girls to try out for the boys' cross-country team when no girls' cross-country team exists.[28]

Without constitutional scrutiny, TSSAA is likely beyond federal accountability. Title IX, which bars gender discrimination, and Title VI, which bars race discrimination, do not appear to apply to high school athletic associations such as TSSAA. *See NCAA v. Smith*, 119 S. Ct. 924 (1999)(holding Title IX inapplicable to NCAA); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)(noting Title IX was patterned after Title VI). If the Sixth Circuit ruling stands, it could dramatically change the landscape of legal accountability for entities like TSSAA nationwide.

SUMMARY OF ARGUMENT

Two sets of functional relationships are important in understanding the state action status of high school athletic associations such as TSSAA. The first is the local-level set of relationships that involves TSSAA, local officials who largely comprise its membership, who control, and who exclusively comprise the governance of the organization, and the local public schools responsible for providing public education in the state. The second is the state-level relationship between TSSAA and the SBE, which is the state agency responsible for statewide governance of the system of public education.

The Sixth Circuit misperceived the nature of the state-level analysis under this Court's cases, *see, e.g., West v. Atkins*, 487 U.S. 42, 55-56 (1988), and ignored entirely the local-government-level relationships, thereby running afoul of *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

The regulatory conduct of high school athletic associations is state action for four basic reasons.

1. Membership and Control. High school athletic associations are made up of local public schools and school

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[27] *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 579 (1999).

[28] *Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922 (8th Cir. 1976).

officials (typically public school principals) who, acting jointly and collectively, regulate high school athletics and control policymaking and decisionmaking. An association that is largely composed of local public schools and public school officials of a single state, that is controlled and exclusively governed by local public officials, and that exercises regulatory control over interscholastic athletics – an integral component of a state-mandated obligation – cannot shed its necessarily public character by calling itself a private, voluntary organization. *Tarkanian*, 488 U.S. at 193 n.13 (noting that the regulatory conduct of a high school athletic association would be state action where the "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign"). *See* note 19, *supra*, and accompanying text. Under this analysis, the identity of the school being regulated – whether it is public or private – is analytically irrelevant.

2. Joint Participation. Private persons who act jointly with public officials are acting under color of state law. *Lugar*, 457 U.S. at 941. Even if TSSAA is deemed a "private" entity, which petitioner disputes, it acts jointly with the public officials who control it, and, under the joint participation principle, acts under color of state law.

3. Delegation. Interscholastic athletics constitute an important part of a high school's program and a considerable part of its budget. Every state's constitution imposes a duty on government to maintain a public school system. When the state (through the SBE [state-level] or through public schools and their officials [local-level]) explicitly or implicitly delegates a portion of that responsibility – regulating and coordinating interscholastic athletics and determining which schools can compete against public schools and on what terms – to a separate entity, the state cannot escape ultimate constitutional responsibility for the conduct of that entity. *See West v. Atkins*, 487 U.S. 42, 55-56 (1988) (where state has a duty to provide a service, it cannot deprive injured parties of constitutional recourse by delegating provision of the service

to a private party); *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 988 (1999) (reaffirming *West*'s delegation principle where state's "constitution or statutory scheme obligates the State to provide" services); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (that state delegates "some portion" of a constitutional or statutory duty to a private party "does not change the governmental character of the power exercised").

4. Significant Encouragement. TSSAA's regulatory conduct is state action because TSSAA has received "significant encouragement" from the state, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), in the form of "overt, significant assistance" of government officials, *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988), and because the state has identified itself with TSSAA to such a degree that TSSAA's conduct bears the state's imprimatur. *Edmonson*, 500 U.S. at 621-22, 628.

ARGUMENT

I. This Court's Analysis in *Tarkanian* Requires Reversal

NCAA v. Tarkanian, 488 U.S. 179 (1988), dealt with the state-action status of NCAA in the context of a disciplinary proceeding involving Coach Tarkanian and the University of Nevada, Las Vegas (UNLV). A national organization of public and private colleges and universities, NCAA adopts rules that govern intercollegiate athletics. Tarkanian violated NCAA rules, and NCAA threatened UNLV with sanctions if Tarkanian was not disciplined. UNLV disciplined Tarkanian, who sued NCAA, claiming it was a state actor in its disciplinary role vis-à-vis UNLV.

Three distinct analytical approaches to the state-action issue were considered in *Tarkanian*. First, "the relationship between UNLV and the NCAA regarding the NCAA's rulemaking" was analyzed. *Id.* at 193. That component of *Tarkanian* focused on NCAA's composition and issues of control, with the analysis aimed at understanding the nature of the organization. Second, *Tarkanian* considered the contention that "NCAA's ... enforcement proceedings ...

constituted state action because they resulted from a delegation of power by UNLV." *Id.* at 195. Third, the *Tarkanian* dissent viewed the issue as whether private parties such as NCAA "could be held to be state actors in cases in which the final or decisive act was carried out by a state official." *Id.* at 200. Under the "joint participation" cases, private parties can be state actors when "jointly engaged with state officials in the challenged conduct." *Id.* (internal quote omitted). The dissent would have found NCAA to be a state actor because it "acted jointly with UNLV in suspending Tarkanian." *Id.* The majority was unpersuaded by the "joint participation" theory in the context of that case. *Id.* at 196 n.16.

A. The Regulatory Conduct of TSSAA Constitutes State Action

The regulatory conduct of an organization that establishes and enforces the rules by which both public and private high school teams and players compete throughout the state, whose membership consists of institutions within the same state, many of them public institutions created by the same sovereign, and whose regulatory conduct is controlled by those public institutions and their officials constitutes state action. *Id.* at 193 n.13. The composition of TSSAA, its mission, and its governance structure belie the claim that TSSAA is a "private" organization.

1. The Analysis in *Tarkanian* and Footnote 13

In *Tarkanian*, this Court held that NCAA was not a state actor when it made and enforced rules and regulations governing intercollegiate athletics. UNLV, which employed Tarkanian, was a member of NCAA, "participated in promulgating the Association's rules," and therefore "had some impact on the NCAA's policy determinations." *Id.* at 193. But neither UNLV nor Nevada controlled NCAA. UNLV was only one of the "NCAA's several hundred other public and private member institutions," and each of those other institutions (located outside Nevada) "similarly affected those policies." Those non-Nevada institutions "did not act

under color of Nevada law," and, therefore, NCAA's promulgation and enforcement of rules and regulations were not fairly attributable to Nevada. NCAA's members, "the vast majority of which were located in States other than Nevada," were the true "source" of the rules and regulations adopted by NCAA, and the organization influenced by those member institutions (NCAA) was "independent of any particular state." *Id.* Nevada, through UNLV, had only a "minor role in the[] formulation" of NCAA's rules and regulations and in their implementation. The conduct of NCAA could not fairly be attributed to Nevada. *Id.* at 195.

Whereas NCAA was not controlled by or sufficiently influenced by any governmental institution of Nevada to warrant attributing its conduct to Nevada, this Court recognized that "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* at 193 n.13.

The clear reason for the difference is that, within a single-state athletic association, the members who control the regulatory conduct of the association are public officials from the same state. They have more than a "minor role in the[] formulation" and implementation of association policy. *Id.* at 195. The "collective membership" are not "independent of any particular State." *Id.* at 193. Rather, public schools and their officials from within an individual state largely run and control those organizations, so that the organizations are properly viewed as vehicles through which "public institutions created by the same sovereign," *id.* at 193 n.13, act "collective[ly]" and constitute the true "source" of the policies adopted and implemented. *Id.* at 193. The regulatory conduct of associations such as TSSAA is "fairly attributable" [29] to the state in which they are located.[30]

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[29] In view of their exercise of a regulatory function regarding an integral component of a state's educational process – interscholastic athletics – and given their composition, governance, and the resulting control by public institutions and their officials, *see Metropolitan Washington Airports Auth.*,

2. Conduct of Public Officials Acting in an Official Capacity and of Organizations They Control Is Presumptively State Action

The analysis in *Tarkanian* is supported by this Court's cases that hold that, as a general rule, "a public employee acts under color of state law while acting in his official capacity." *West v. Atkins*, 487 U.S. at 50; *accord*, *Lugar*, 457 at 935 n.18 ("[S]tate employment is generally sufficient to render the defendant a state actor"); *id.* at 937 (a person may "fairly be said to be a state actor ... because he is a state official"); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 n.5 (1978)("The involvement of a state official ... plainly provides state

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501 U.S. at 265-69, these associations may fairly be seen not as private entities at all but as "Government itself." *Lebron*, 513 U.S. at 378. *See id.* at 396-97, 399 (emphasizing that the "Government exerts ... control [over Amtrak] ... as a policymaker"]. An association largely composed of and controlled by public officials of a single state cannot shed its public character by calling itself a voluntary organization. *Cf. id.* at 392-93 ("If Amtrak is, by its very nature, what the Constitution regards as the Government," then it is subject to the First Amendment "whatever congressional label" is attached, and a statutory disclaimer of governmental status is of no constitutional effect).

[30] *Tarkanian*, 488 U.S. at 193 n.13, cited favorably two circuit court decisions holding that the regulatory conduct of high school athletic associations constituted state action. *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968). *Clark* was a challenge to a policy of the Arizona Interscholastic Association (AIA) that precluded boys from playing on girls' interscholastic volleyball teams in Arizona high schools. 695 F.2d at 1127. *St. Augustine* was a parochial school's challenge to a racially segregated system of interscholastic high school athletics maintained by LHSAA.

In reviewing *Clark* and *St. Augustine*, the district court identified nine factors that those courts had found important in determining that the regulatory conduct of a high school athletic association constituted state action and concluded that "[a]lmost identical factors are present in this case." CP 30-31-B. *See also Kelley v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968)(relying on *St. Augustine* to find that the regulatory conduct of TSSAA constituted state action and concluding that TSSAA "is an instrumentality of the state for purposes of the Fourteenth Amendment").

action")(internal quote omitted). TSSAA's regulatory conduct constitutes state action because an entity which, like TSSAA, is controlled and governed by public officials who serve in an ex officio capacity while performing regulatory functions,[31] presumptively operates under color of law.[32] See note 18, *supra*.

Thus, TSSAA's constitutional status is determined by those who control the entity, in this case public officials. *See Lebron*, 513 U.S. at 399 (focusing on nature of government control over Amtrak and fact that government "controls the operation of the corporation through its appointees" in concluding that Amtrak is agency or instrumentality of federal government subject to First Amendment scrutiny).[33]

That TSSAA is controlled and governed by public officials who serve in an ex officio capacity is clear. Eligibility for election to the TSSAA Board of Control and its Legislative Council is based on official status and is limited to high school principals, assistant principals, or qualified superintendents. JA-89, 92; CP 5-B. Public high school administrators who serve on the Legislative Council and the Board of Control attend the meetings as part of their official

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[31] The specifics of the contractual arrangements are not determinative. "It is the ... function within the state system, not the precise terms of ... employment" that determines whether the conduct "can fairly be attributed to the State." *West v. Atkins*, 487 U.S. 42, 55-56 (1988).

[32] See *Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957) (holding that Girard College, which had been built and maintained pursuant to a privately erected trust, was a state actor because it was operated and controlled by a board of state appointees, which was itself a state agency). *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 269 (1991)(effective control determines nature of entity in separation-of-powers context).

[33] *Cf. id.*, 501 U.S. at 269 & n.15 (holding that Congress' "effective control" and not just its "formal appointment and removal power" is critical in determining the constitutional status of a board that can exercise veto power over an airport authority); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)(holding that power of removal, even if not exercised, provided Congressional control over Comptroller General and constitutionally determined the legislative nature of the office).

duties – *i.e.*, on school time when the meetings occur while school is in session – and are typically reimbursed for expenses by their schools for attendance at meetings. JA-39-40, 298. Schools voting for members of the Board of Control or Legislative Council must be represented at the meeting where the election takes place by the school's "principal, or other faculty member." JA-89, 92. All the voting members of the Legislative Council and the Board of Control were public school employees/administrators when petitioner was disciplined. JA-24, ¶15.[34] The voting membership of TSSAA is 84% public schools and public school officials. The control of TSSAA is therefore entrenched in the hands of public officials, thereby establishing its constitutional status as a state actor.[35]

In only one case, *Polk County v. Dodson*, 454 U.S. 312 (1981), has this Court "determined that a person who is employed by the State and who is sued under §1983" while "acting in his official capacity" was not operating under color of state law. *West v. Atkins*, 487 U.S. at 50. In *Polk County*, a public defender employed by government was found not to act under color of state law because, in the defense attorney's traditional role, the public defender "is not acting on behalf of the State; he is the State's adversary." 454 U.S. at 322 n.13. *Polk* has no application here.

A functional analysis determines whether a public employee or an organization largely composed of and controlled by public employees acts under color of state law. *Id.* at 324-25 (public defender acts under color of state law in performing non-criminal-defense roles such as "making hiring

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[34] *Cf. Metropolitan Washington Airports Auth., supra* note 19.

[35] Whether the public officials who control TSSAA choose to elect one or more private school representatives to either the Board of Control or the Legislative Council is irrelevant, as the control (not its exercise) is determinative of the constitutional status of TSSAA. See *Metropolitan Washington Airports Auth.*, 501 U.S. at 269 n.15 (noting that control is critical element in determining an institution's constitutional status, not whether such control is exercised in a particular manner, which is "irrelevant"); *Bowsher v. Synar*, 478 U.S. at 730 (same).

and firing decisions on behalf of the State").[36] In this case, TSSAA performs only one type of function – it regulates interscholastic athletics, an integral component of the state's educational system, on behalf of public schools and directly controls who plays interscholastic athletics against all public high schools in Tennessee and upon what terms. It is not acting as the state's adversary but is acting on the state's behalf, "carry[ing] a badge of authority of [Tennessee] and represent[ing] it." *Tarkanian*, 488 U.S. at 191 (internal quote omitted). TSSAA's regulatory conduct directly affects those such as petitioner who are subject to its authority. TSSAA is "acting on behalf of the State," *Polk County*, 454 U.S. at 322 n.13, serving as an "agent" of the state. *Tarkanian*, 488 U.S. at 196.[37]

In sum, the function of TSSAA is regulatory, controlling an important component of the state's educational program. A private school seeking to play interscholastic athletics with a public school must secure the approval of TSSAA's Executive Director and comply with applicable TSSAA standards. TSSAA is clearly not a sports club or a coaches' association, which has no regulatory authority. TSSAA plays an important regulatory role as the gatekeeper and coordinator of interscholastic athletics. Its regulatory and adjudicative decisions are authoritative not just advisory.[38] TSSAA's regulatory function provides no basis for excluding it from the presumptive state-actor status that follows from its being an organization governed and controlled by (local) public officials.

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[36] For additional authority on the importance of a functional analysis, see cases cited at note 44, *infra*.

[37] TSSAA is an agent of the state not only because it is governed and controlled by local public school officials but also because it was designated at the state level by the SBE as its agent in coordinating and regulating interscholastic athletics statewide. See CP 23-27-B.

[38] *Cf. American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. at 987(decision of utilization review organization, a private organization not controlled by governmental officials but charged with making medical necessity decisions in a state's workers compensation program, is state action).

Under the circumstances, regulatory decisions of TSSAA do not reflect "the exercise of private choice." Given TSSAA's role and mission, its structure and composition, and the regulatory function that it performs on behalf of the state and local levels of government, TSSAA's regulatory conduct necessarily results from "state influence or coercion." *Lebron*, 513 U.S. at 412 (O'Connor, J., dissenting).

3. The Public or Private Status of the Institution Being Regulated Is Analytically Irrelevant Under *Tarkanian* Footnote 13

The Sixth Circuit distinguished *Tarkanian* footnote 13 on the ground that it did not attach state-action status to TSSAA's regulatory conduct when, as in this case, TSSAA regulates a private school such as petitioner.[39] 180 F.3d at 766. "This analysis misapplies the reasoning in *Tarkanian.*" *Communities for Equity*, 80 F. Supp.2d at 742.

An important issue that divided the *Tarkanian* majority from the dissent was whether UNLV's adverse employment actions and NCAA's recommendations were so coordinated that they should be considered "joint actions." If they were, then NCAA (a private organization under this scenario) would be deemed a "joint participant" with UNLV (a public entity under this analysis), and NCAA's conduct would be deemed state action. *See Dennis v. Sparks*, 449 U.S. 24 (1980) (private parties bribing and conspiring with a judge held to be acting under color of state law).

The dissent found the "joint participation" theory persuasive and would have found NCAA to have acted under color of state law. 488 U.S. at 200-02 & n. 2. The majority, on the other hand, was unpersuaded by the "joint participation" approach under the circumstances of that case. "NCAA cannot be regarded as the agent of UNLV" because

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[39] The Sixth Circuit's rationale was that in footnote 13 this Court "note[d] that all nine justices agreed that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" 180 F.3d at 766.

UNLV was "at odds with" NCAA regarding the disciplinary action against Tarkanian. *Id.* at 196.

The Court found persuasive the analogy to the state-action status of a public defender. See *Polk County v. Dodson*, 454 U.S. 312 (1981). A public defender does not act under color of state law when defending against a criminal prosecution because the public defender acts against the state-as-prosecutor not on the state's behalf. *Id.* at 320. In *Tarkanian*, the interests of NCAA and UNLV did not coincide; "rather, they ... clashed throughout the investigation, the attempt to discipline Tarkanian," and the ensuing litigation. "UNLV and the NCAA were antagonists not joint participants, and the NCAA may not be deemed a state actor on this ground." 488 U.S. at 196 n.16.

Under the dissent's "joint participation" theory, NCAA would not act under color of state law if it acted jointly with a private university in enforcement of a disciplinary action. In such a situation, two private parties would be acting together, and there would be no state action. *Id.* at 202 n.2 (dissent).

As discussed *supra*, a different state-action theory considered in *Tarkanian* was whether UNLV exercised such control over NCAA that NCAA policies and actions were state action, fairly attributable to Nevada. *Id.* at 193. The majority observed that NCAA was a national organization, composed of hundreds of public and private colleges and universities from across the country. Those institutions were the "source of the legislation adopted by the NCAA," and the "vast majority ... were located in States other than Nevada." Thus, the NCAA's "collective membership" controlled the NCAA, and that membership was "independent of any particular state." Under the circumstances, NCAA did not act "under color of Nevada law," as the control of NCAA could not be fairly attributed to Nevada or to any single state given the national composition of NCAA's membership. *Id.*

Footnote 13 enters at this point. The Court noted that, with respect to the "membership" theory of state action, which

focuses on where control of an entity rests, the "situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." By its approving citation of two cases[40] involving the state-action status of the regulatory conduct of high school athletic associations, the Court clearly contemplated a situation such as the one involved herein. Indeed, one of the two cases cited, *St. Augustine*, involved a *private* school's challenge to alleged racial discrimination on the part of LHSAA in carrying out its regulatory function.

The next sentence of footnote 13 noted that "[t]he dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership." The Court cited footnote 2 of the dissent, in which the dissent had explained that under its "joint participation" theory, NCAA would not be a state actor in enforement matters involving private NCAA members.

From that innocuous acknowledgment of an area of agreement between the majority and the dissent, the Sixth Circuit carved out a broad and unwarranted exception unsupported by footnote 13 and, really, unsupported by any analysis at all. The court held that the regulatory conduct of TSSAA did not constitute state action when it regulated private schools. This does not follow at all from footnote 13.

Footnote 13 dealt with the membership/control analysis of state action, unchallenged by the dissent. That the dissent's "joint participation" analysis would not apply when the school being regulated is a private school simply has no bearing on this Court's membership/control analysis of a high school athletic association such as TSSAA, in which the public or private status of the school being regulated is analytically irrelevant. The Sixth Circuit "misapplie[d]" and "misstate[d]

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[40] See note 30, *supra.*

the ... reasoning in *Tarkanian* [footnote 13]." *Communities for Equity*, 80 F. Supp.2d at 742

In sum, TSSAA acted under color of law when it formulated and directly enforced the Recruiting Rule because of the nature of its composition and governance. Control over TSSAA is exercised by public schools and their officials who are public employees and who serve a regulatory function in their ex officio capacity as public school officials. The public or private status of the institution being regulated is analytically irrelevant for determining TSSAA's state-action status under *Tarkanian* footnote 13.

B. Government May Not Absolve Itself of Constitutional Accountability By Delegating a Function It Is Obligated to Provide

In *Tarkanian*, this Court stated that "[i]t is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor." 488 U.S. at 195. Where a state's "constitution or statutory scheme obligates the State to provide" a service, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. at 988, the state may not delegate its responsibility so as to "leave its citizens with no means for vindication" of their rights. *West v. Atkins*, 487 U.S. at 56 n.14. "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution" by delegating those obligations to a "private" entity. *Lebron*, 513 U.S. at 397. *Cf. Edmonson.*, 500 U.S. at 626 (that state delegates "some portion" of a constitutional or statutory duty to a private party "does not change the governmental character of the power exercised").

Nor may government absolve itself from a duty by "contracting out" its responsibility. Those harmed by the regulatory conduct of the delegatee cannot be deprived of their "means to vindicate" their constitutional rights. *West*, 487 U.S. at 56. If this were not the case, the state would be "free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been

delegated to 'private' actors, when they have been denied." *Id.* at n.14 (internal citation omitted).

In this case two types of delegation have occurred, even assuming that TSSAA is a "private" entity to begin with. First, at the local level, public schools have delegated to TSSAA responsibility for determining who can schedule games against public schools and the terms upon which those contests can proceed. Second, at the state level, the SBE has explicitly and implicitly designated TSSAA as its agent for regulating interscholastic athletics, a component of Tennessee's system of public education. With its board "consist[ing] entirely of public school officials," TSSAA is the government's "agent for controlling an important, highly visible[41] component of its statewide educational program – inter-school athletics." 190 F.3d at 707 (dissent).

Local-level Delegation. If a public school announced a policy that it would not play interscholastic athletics against a private school that exercised its rights of free expression in a certain way, that decision would be subject to constitutional scrutiny. In this case, all 290 public schools in Tennessee that participate in interscholastic athletics, acting jointly and collectively, have delegated the authority to suppress petitioner's speech to a nominally private entity they control to set those eligibility standards (through adoption of the challenged Recruiting Rule). Delegation of this decision in this manner does not absolve these local public schools and their officials of constitutional accountability, nor does it deprive a victim of censorship such as petitioner of its claim to constitutional recourse.

The local-level delegation to TSSAA establishes TSSAA as ultimate adjudicator, much like the utilization review organization (URO) in *American Manufacturers*. The URO, a truly private entity, was given responsibility under state law to

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[41] Public school teams play on public school fields, in school uniforms, and with cheerleading squads bearing official school insignia. Public schools transport students to interscholastic events in school buses bearing the markings of the public school or the school district.

determine medical necessity in the state's workers compensation scheme. The designation of UROs to perform that task turned their decision into state action. 119 S. Ct. at 987. In this case, TSSAA has final authority to formulate, implement, and adjudicate compliance with the Recruiting Rule. Its sanctions against petitioner are final and its decisions are binding on all TSSAA members. TSSAA is an "agent" of its members, largely public schools, in carrying out their responsibility to regulate an important component of their educational program. *Tarkanian*, 488 U.S. at 196. Under *American Manufacturers*, TSSAA's regulatory decisions are surely attributable to the state.

In *Tarkanian*, this Court noted that government does not confer state-action status on a private entity when it adopts rules recommended by that private entity. 488 U.S. at 194. For example, a state supreme court is constitutionally accountable for formulating and enforcing disciplinary rules on its members. However, a state supreme court's adoption of bar-association-recommended rules does not transform the conduct of the bar association into state action when the court "retain[s] plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Id.* (discussing *Bates v. State Bar*, 433 U.S. 350 (1977)).

However, consider what would happen if a state supreme court did not just accept a recommendation from a private entity but delegated authority over bar discipline to that entity to make decisions as a governmental proxy.

Tennessee's supreme court, which has five members, is responsible for bar admissions. Assume that that court created a nominally private Bar Regulation Entity (BRE) with its own charter. Membership consisted of the five members of the state supreme court and the president of the Tennessee Bar Association. Under such an arrangement, 83% of the membership of the organization would be state supreme court justices and 17% would be a private individual (comparable to the compositional statistics for TSSAA). Could the Tennessee supreme court evade its obligations under *Bates* by

delegating regulatory authority to BRE to establish a ban on attorney advertising, which *Bates* held to violate the First Amendment? This, in effect, is what the local public schools have done in organizing TSSAA and empowering it to regulate interscholastic athletics by suppressing expression. It surely transgresses the delegation principles established in *West* and *American Manufacturers*, impermissibly allowing government to "evade the most solemn obligations imposed in the Constitution," *Lebron*, 513 U.S. at 397, and impairing the ability of persons adversely affected "to vindicate" their basic First Amendment rights. *West*, 487 U. S. at 56 & n.14.

State-level Delegation. At the state level, SBE is largely responsible for administering the state's system of public education. SBE has delegated responsibility for regulating interscholastic athletics to TSSAA. For the 24-year period 1972-96, that delegation was explicit by SBE rule. Prior to 1972 and since 1996, that delegation has been implicit through "custom and practice."[42] Throughout the period, "Tennessee ... has recognized TSSAA as the official body for the regulation and control of interscholastic athletics." CP 27-B.

Tennessee's Constitution, Article XI, Section 12, requires the state to "provide for the maintenance, support and eligibility standards of a system of free public schools." The "responsibility for designing and maintaining a free public school system rest[s] on the General Assembly." *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993). In *Small Sch. Systems*, the court held the system of financing public education in Tennessee unconstitutional under the state constitution. The unequal funding of different school systems was justified by the state on the ground that Tennessee had chosen to rely on local taxation as a means for paying for a large part of public education. Since the tax

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[42] §1983 applies to custom and practice as well as to formal governmental conduct. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162-69 (1970).

bases of different school systems varied, the funding levels would necessarily vary.

In response to that argument, the Tennessee Supreme Court held that delegation of financing of public education to local units of government did not abrogate the "duty specifically imposed upon the General Assembly by the [Tennessee] constitution." *Id.* at 156. Therefore, under Tennessee law, it is the ultimate responsibility of the state to retain accountability for the administration of the public school system. *Cf. American Manufacturers*, 119 S. Ct. at 988 (noting that state's delegation of services a state's "constitution or statutory scheme obligates the State to provide" does not absolve it from constitutional scrutiny); *West*, 487 U.S. at 55 & n.13 (same).

If delegation to local units of government is not a sufficient basis for exonerating the state for the consequences of that delegation, surely delegation to TSSAA cannot insulate the state from ultimate responsibility and accountability. The state may choose to delegate regulatory responsibility and standard-setting to TSSAA, but that is not a means by which the state can avoid ultimate responsibility and accountability for the impact on regulated entities such as petitioner whose ability to compete against public schools is adversely affected.

The state-level delegation to TSSAA has another important effect. It identifies the state with TSSAA's conduct, giving the state's imprimatur to the TSSAA. The extent to which TSSAA "relies on governmental assistance and benefits" is an important component of state-action analysis. *Edmonson*, 500 U.S. at 621. When "private parties make use of . . . the overt, significant assistance of [government] officials, state action may be found." *Tulsa Professional Collection Servs.*, 485 U.S. at 486.

Where the state is identified with private conduct, it may not "effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them." *Burton v.*

Wilmington Pkg. Auth., 365 U.S. 715, 725 (1961). The activities regulated and sponsored by TSSAA typically take place in public, "state-owned facilities," JA-41, ¶25, and financially support TSSAA. *Id.* SBE monitors and oversees the conduct of TSSAA, and TSSAA administrators are "considered as teachers" and participate in the public employee retirement system. JA-39, ¶21. And, of course, TSSAA itself is run and controlled by local-level public officials serving ex officio. SBE's explicit and implicit delegation of regulatory authority to TSSAA has placed the state's imprimatur on TSSAA's regulatory conduct and made the identification of TSSAA with the state unmistakable. "[R]egardless of how the TSSAA denominates itself as an organization, or how it characterizes its relationship with its member schools, 'it is abundantly clear that the association's very existence is entirely dependent upon the absolute cooperation and support of the public school systems' of the State of Tennessee" (internal quote omitted). CP 35-B

Thus, there is a high degree of interdependence between TSSAA (which claims to be a private party) and public school officials. Governed by public school officials and deferred to by local public school officials for carrying out "an important function within the government" – the regulation of interscholastic athletics, which is an integral component of the public education process and system – TSSAA certainly "act[s] with [government's] substantial assistance," *Edmonson*, 500 U.S. at 628, and heavily "relies on governmental assistance and benefits." *Id.* at 621.

The Sixth Circuit seemed to acknowledge the force of the delegation argument but rejected petitioner's state action claim, relying exclusively on SBE's 1995 rule change (recognizing rather than designating TSSAA and expressly and exclusively authorizing public schools to join TSSAA). For the Sixth Circuit, the revocation of explicit delegation was "fundamental" and "dictate[d] the outcome of the present case." 180 F.3d at 765-66.

The district court found the formal revocation of explicit delegation by SBE to be a hollow formalism in response to other cases holding TSSAA to be a state actor. CP 26-27-B. The revised rule "clearly singles out the TSSAA by name" to serve as "the official organization for supervision and regulation of secondary school athletics." *Id.* at 26-B. The "connections between TSSAA and the State are still pervasive and entwined." *Id.* Despite the changed rule, "[n]othing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed." That is, there was a "mere change in the words of the regulation, apparently to avoid a litigation claim of state action," but there was no change in the "actual conduct of the TSSAA." *Id.* at 26-27-B.

In relying exclusively on SBE's formal revocation of explicit delegation of regulatory authority to TSSAA, the Sixth Circuit did not address the functional realities[43] This was analytical error as this Court's cases have required such a functional analysis.[44] Judge Merritt's dissent properly decried

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[43] Petitioner does not rely on a "public function" theory of state action, which requires that the activity in question be an "exclusive" public function. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978). In contrast, the functional relationships involved in this case need not have been exclusively performed by government. *Compare Edmonson*, 500 U.S. at 621-28 *with id.* at 639-40 (O'Connor, J., dissenting).

[44] *See, e.g., Georgia v. McCollum*, 505 U.S. 42, 54 (1992)(state action status depends on "nature and context of function" being performed); *Edmonson*, 500 U.S. at 621 (consideration of whether an "actor is performing a traditional governmental function" an important factor in determining state actor status); *West v. Atkins*, 487 U.S. at 55-56 (state actor status of private physician who provided medical care by contract in state prison was determined by his "function[s] within the state system, not the precise terms of his employment," by examining the nature of the "relationship among the State, the physician, and the prisoner" not just the formal terms of the contract); *Polk County v. Dodson*, 454 U.S. at 321 (though employed by the state, public defender is not a state actor because of the "nature of his function" within the adversarial criminal justice system); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974) (Fourteenth Amendment's "proscription on state action applies de facto as well as de jure"); *Evans v.*

the failure of the Sixth Circuit to engage in a "'functional' analysis of the activity of the private ... agency in question to determine the degree of 'cooperation' between state and local officials and the actor and an analysis of the degree of 'coercion' exercised by the actor over persons under the control of a state or local governmental institution." 190 F.3d at 707.

For years, as a result of formally delegated authority, TSSAA has run a critical component of Tennessee's public education program. There continues in fact to be "entwined ... management or control," *Evans,* 382 U.S. at 301, between government and TSSAA, as well as substantial ongoing effects of years of actual and perceived inter-relatedness, as no substantial alteration of preexisting policies has taken place. *See Flagg Bros.*, 436 U.S. at 159 n.8. The structural relationship between TSSAA and SBE and the function performed by TSSAA result in state actor status for TSSAA. SBE's formal resolution regarding TSSAA in 1995 does not magically shift TSSAA from state actor to private status.

C. Even If TSSAA Be Deemed a Private Entity, It Acts Jointly With Public Officials and Under the Joint Participation Principle TSSAA Acts Under Color of State Law

When private persons act jointly with public officials, they act under color of law. "Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of §1983 actions." *Dennis v. Sparks*, 449 U.S. at 27-28.[45] It is enough that a private party

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Newton, 382 U.S. 296, 301-02 (1966) (public nature of racially segregated park, originally devised to City of Macon as trustee and which had been an "integral part" of the city's activities, could not be "dissipated ipso facto by the appointment of 'private' trustees," where there was no clear and demonstrable change in the substantive relationship of the city to the park; private trustees' conduct was state action).

[45] *See also Lugar*, 457 U.S. at 941 ("[A] private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor'"); *Rendell-Baker v. Kohn*, 457 U.S. at 838 n.6 (1982)(noting the importance for state action analysis of "whether

"is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966).

Tarkanian rejected application of the joint participation theory in that case because this Court could not view NCAA as "an agent of UNLV" under the circumstances. 488 U.S. 196. The "relevant interests" of the state and private parties did "not coincide" as they do in the joint participation context. Rather, they "clashed throughout the [NCAA] investigation, the attempt to discipline Tarkanian," and in the subsequent litigation. Since "UNLV and the NCAA were antagonists, not joint participants," this Court declined to deem NCAA a state actor under the joint participation theory. *Id.* at n.16.

No such antagonism exists in this case. TSSAA is a joint venture among public officials and public entities involving an integral component of the public educational process. Even if TSSAA is (mis)characterized as a private entity, in carrying out its regulatory mission, it is acting in "joint participation" with public school officials that comprise its governance structure. Surely if private persons "jointly engaged with state officials in the challenged action" are acting under color of law, then *a fortiori*, public officials who act in concert with other public officials in a common venture whose conduct is subject to challenge are acting under color of law. And the common venture itself (TSSAA), which serves as the forum for and the vehicle for implementing the "joint participation," is also acting under color of state law. This makes the regulatory conduct of TSSAA state action – fairly attributable to the government.

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action was taken in concert with a state actor" and reaffirming that in certain circumstances "the acts of a private party are fairly attributable to the state ... when the private party act[s] in concert with state actors"); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of [§1983]."); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (where the state "has so far insinuated itself into a position of interdependence" with a private actor, the state "must be recognized as a joint participant in the challenged activity," which then becomes state action under §1983).

The counterargument – that TSSAA and its officials act in a "private" capacity, formulating and implementing regulatory rules for governing interscholastic athletics for all public schools in the state – is untenable. The local public officials who run and control TSSAA in their "private" capacity are the very same people who in their "day jobs" run the public schools and control their athletic programs. Then, these same people, now wearing their public school hats, act in their official capacity as public high school principals to dispassionately and independently judge the decisions they themselves have taken in their so-called "private" capacity. This is more the jurisprudence of Houdini than Holmes.

TSSAA officials are public employees representing their public schools within TSSAA. Composed and controlled as it is, by public schools and their officials, and performing a regulatory function, TSSAA formulates and enforces regulations (such as the Recruiting Rule). At the very least, those officials are acting jointly with and among themselves in their ostensibly distinct capacities. The "joint participation" is self-evident from the blurring of the roles. The contention that public officials acting through TSSAA should be deemed "private" actors when those very same people act upon and implement in their acknowledged public capacity the decisions they themselves took in the context of TSSAA just cannot withstand serious scrutiny.

II. Reversal Is Required Because TSSAA's Regulatory Conduct Is State Action As TSSAA Has Received "Significant Encouragement" from the State

State action arises when government "has provided such significant encouragement" to a nominally private decision that "the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). One way of establishing this type of "encouragement" is to determine "the extent to which the actor relies on governmental assistance and benefits," *Edmonson*, 500 U.S. at 620, whether a private party has received "the overt,

significant assistance of state officials." *Tulsa Professional Collection Servs.*, 485 U.S. at 486.

In this case, TSSAA "simply could not exist" without the "overt, significant participation of the government." *Edmonson*, 500 U.S. at 622. This type of government assistance has occurred at both the state and local levels.

TSSAA has supervised and regulated interscholastic athletics in Tennessee through "deference" from the state prior to 1972, by express designation and delegation of authority from SBE from 1972-1996, and, since 1996, by affirmative "recogni[tion]" and express, exclusive singling out on the part of the SBE. CP 23-37-B. Thus, TSSAA's regulation of high school interscholastic athletic competition and its enforcement of the challenged Recruiting Rule result from extensive "governmental assistance and benefits." *Edmonson*, 500 U.S. at 621. This governmental "deference," "designat[ion]," delegation, "recogni[tion]," and overall singling out of TSSAA for its special and unique role in regulating and supervising interscholastic athletic competition in Tennessee places a public imprimatur on TSSAA's activities. This is "significant encouragement" so that TSSAA's regulatory conduct "must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

In addition, at the local level, TSSAA's "'very existence is entirely dependent upon the absolute cooperation and support of the [local] public school systems' of ... Tennessee." CP 35-B (internal quote omitted). TSSAA would have no role without a close working relationship with the public schools, and its very composition and governance rely on the active participation of public school principals. This is a joint venture of public entities and public officials, and the work of TSSAA would be impossible to maintain in its current form without the "overt, significant assistance", of local public officials. It is hard to imagine a closer relationship than the one embraced in TSSAA where the very same people who formulate and enforce TSSAA rules and regulations are

themselves the public employees responsible for implementing those policies as part of their official duties in administering the state's public schools.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed.

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IN THE

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OCTOBER TERM, 1999

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION
and RONNIE CARTER,
Executive Director and Individually,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

On August 23, 1997, the Tennessee Secondary School Athletic Association ["TSSAA"] found that Brentwood Academy, a voluntary member of the Association, had used undue influence to secure the attendance of several eighth-grade star student-athletes for athletic reasons, in violation of the TSSAA "recruiting rule." Eleven days earlier, Brentwood Academy had submitted the annual renewal form for its membership in TSSAA, agreeing to conduct its athletic programs in accordance with the rules and decisions of TSSAA. [Apx. pp. 284-93]. Just a few days after the TSSAA Board of Control made its decision, Brentwood Academy filed with TSSAA another annual form in which it agreed to comply with the provisions of the recruiting rule in full. (Apx. pp. 294-97). Unhappy with the TSSAA rules and decisions with which it agreed to comply, Brentwood Academy filed this lawsuit, using the federal courts and the Constitution of the United States as vehicles by which it could continue to reap the benefits of membership in TSSAA without fulfilling the agreements it made as a condition of that membership.

This case is about Brentwood Academy's desire to compete for TSSAA championships without playing by the TSSAA rules. Brentwood Academy, despite its relatively small enrollment, has been a high school football powerhouse. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 180 F.3d 758, 760 (6th Cir. 1999). Brentwood Academy has won nine (9) TSSAA state football championships, usually playing against schools with much larger enrollment.

The TSSAA recruiting rule serves two important purposes. First, it prevents unscrupulous individuals

from treating athletically gifted children as commodities and luring those children to attend particular schools because they are athletically gifted, without regard to whether they will be well suited to the academic and social climates of the school. Second, the recruiting rule is a means that the member schools of TSSAA have chosen to keep the playing field level among competitors. Brentwood Academy, on the other hand, has no apparent interest in a level playing field. Brentwood Academy understandably likes its view from the top, and the recruiting of athletically gifted 13- and 14-year-old kids is one way for Brentwood Academy to remain there.

This case is not about the Tennessee State Board of Education or the physical education requirement in the public school curriculum approved by the State Board of Education. This case is not about any alleged desire by public schools to retain outstanding athletes. This case is not about Brentwood Academy attempting to convey its message. This case is not about weighty issues like school choice, free speech, or constitutional accountability. Although creatively wrapped in a constitutional package, this case is really about high school football playoffs and Brentwood Academy's desire to win TSSAA championships at any cost, playing by its own rules instead of the rules that the other 349 member schools of TSSAA have written for themselves and chosen to follow.

SUMMARY OF THE ARGUMENT

The legal issue in this case is whether TSSAA acted under color of state law for purposes of 42 U.S.C. §1983 when it enforced its recruiting rule against Brentwood Academy, a private school that voluntarily joined TSSAA

and agreed in its membership contract to comply with the TSSAA rules and decisions.

TSSAA is a private corporate entity. Membership in TSSAA is voluntary. Both public and private schools have chosen to join TSSAA. TSSAA establishes and enforces rules under which interscholastic athletic competition among its member schools is conducted. If a school does not wish to compete in accordance with the TSSAA rules, that school may refrain from joining TSSAA and may conduct its interscholastic athletic program in whatever fashion it sees fit.

When the facts are analyzed under the principles used by this Court over the last twenty years to determine when a private party may fairly be said to be acting under color of state law, the conclusion must be drawn that TSSAA is a private party. TSSAA's enforcement of the recruiting rule as to Brentwood Academy is a function of the contract Brentwood Academy voluntarily and freely entered into with TSSAA and not a product of any right, privilege, or power conferred upon TSSAA by state law. Accordingly, TSSAA did not act under color of state law for purposes of 42 U.S.C. §1983 when it enforced the recruiting rule upon a private school, Brentwood Academy, that voluntarily chose to subject itself to the TSSAA rules.

ARGUMENT

I. TSSAA DID NOT ACT UNDER COLOR OF STATE LAW, AS REQUIRED FOR LIABILITY UNDER 42 U.S.C. §1983, WHEN IT ENFORCED ITS RECRUITING RULE AGAINST BRENTWOOD ACADEMY.

A. TSSAA is a Private Party.

TSSAA is a private, not-for-profit corporation, formed in 1925 and incorporated as a private corporation under the laws of the State of Tennessee. As the Tennessee Supreme Court has held, membership in TSSAA is voluntary. *Tennessee Secondary School Athletic Association v. Cox*, 425 S.W.2d 597, 599 (Tenn. 1968). TSSAA operates from privately owned property located at 3333 Lebanon Road in Hermitage, Tennessee. Executive Director Ronnie Carter and his staff of employees run the day-to-day operations of TSSAA. TSSAA, and not the government of the State of Tennessee, employs Carter and the remaining staff. [R. 42, Ronnie Carter Dep. pp. 12, 272-73, 291-92, Apx. p. 267]. Carter and his staff supervise interscholastic athletic competition among TSSAA's secondary school members in football, volleyball, cross country, golf, tennis, soccer, basketball, wrestling, baseball, softball, and track. TSSAA member schools, both public and private, compete interscholastically in other sports unregulated by TSSAA. Both public and private schools compete for championships independent of TSSAA in some of these sports. *See e.g. http://www.hutchinsonschool. org.*; *http://www.gps.edu*. TSSAA operates on a budget of approximately 1.6 million dollars per year in gross receipts. These funds are derived primarily from gate receipts of tournaments and playoffs which TSSAA

sponsors for its member schools. Only 4% of TSSAA's annual gross receipts come from the membership dues paid by member schools, and none of TSSAA's annual gross receipts are derived from tax revenues. [R. 42, Ronnie Carter Dep. pp. 292, 295-298, Apx. pp. 268-69; R. 52 Jerome Saylors Aff., Apx. p. 210]. TSSAA receives no state government funding.

TSSAA does not schedule regular season interscholastic athletic contests, control the sites of regular season athletic contests, or receive any portion of proceeds generated from regular season athletic contests. [R. 42, Ronnie Carter Dep. p. 295, Apx. p. 268]. TSSAA only schedules the athletic contests in the tournaments it conducts. The winners of those tournaments earn the privilege of calling themselves TSSAA champions. TSSAA does not select tournament sites at the district or region levels. TSSAA does select the site for its state tournaments, which are held at both public and private facilities. For example, the TSSAA state championship football games, known as the "The Clinic Bowl," are conducted at Vanderbilt University, a private institution in Nashville. Twenty-eight percent of the remaining TSSAA state tournaments are also held at facilities on the grounds of private schools. Other tournaments, such as those in the spring sports, are held at sites determined by the city that is the successful bidder to host the tournaments. [R 42, Ronnie Carter Dep. p. 296, Apx. p. 268; R. 52, Ronnie Carter Aff., Apx. p. 200].

Like any other private entity, TSSAA must enter into a contract with the State of Tennessee when using a state-owned facility for the conduct of a championship tournament. TSSAA must register with the Sales Tax Division of the Tennessee Department of Revenue and must pay the same amusement and sales taxes assessed

to any other private taxpayer. When using a state-owned facility, TSSAA must furnish the same proof of insurance that is required for private users of such a facility and must agree to indemnify and hold harmless the state owner of the facility from all liabilities arising out of the use of the facility. [R. 52, Ronnie Carter Aff., Apx. p. 200].

Unlike government agencies of the State of Tennessee, there is no statutory authorization for the creation, existence, or operation of TSSAA. The Tennessee General Assembly has created and defined the powers and duties of the various administrative departments and divisions of state government. *See e.g.* Tenn. Code Ann. §§4-3-101, *et seq*. The statutes creating and empowering the various administrative departments of the government of the State of Tennessee include no mention of TSSAA. Instead, TSSAA has existed since 1925 by virtue of its private incorporation and has operated independently of the government of the State of Tennessee. [R. 42, Ronnie Carter Dep. p. 291, Apx. pp. 265-66].

No state law in Tennessee requires any school, public or private, to engage in interscholastic athletic competition at all, much less to join TSSAA. The Tennessee statutes pertaining to public education, contained in Title 49 of the Tennessee Code, are silent with regard to the regulation of interscholastic athletic competition. The only statute that addresses itself to interscholastic athletics at all is Tenn. Code Ann. §49-6-1002(a), passed in 1997 and made effective after the events giving rise to this case. That statute restricts public school principals and teachers from dismissing students during the regular school day to play interscholastic sports. The enactment of that statute reflects the General Assembly's understanding that interscholastic athletic competition

is not a part of the regular school program and ordinarily should not take up any part of the regular instructional day.[1]

TSSAA is a private entity in all respects. It operates from privately owned property. Its day-to-day operations are conducted by privately employed citizens. It receives no government funding. While its employees are permitted to participated in the Tennessee Consolidated Retirement System, the private corporation pays the employer contribution from its own private funds. For government employees who are members of the TCRS, the employer contribution is paid by the govern-

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[1] The Petitioner devotes considerable discussion to the State Board of Education requirements for "physical education" instruction in the public schools and for accreditation of private schools. *See* Brentwood Academy brief pp. 10-11, 15-16. It is true that SBE Rule 0520-1-3-.06 does give local school boards the discretion to substitute participation in interscholastic athletics and marching band for the physical education graduation requirement. [Apx. p. 243]. However, the promulgation of this rule reflects the understanding of the SBE that "physical education" does not ordinarily encompass interscholastic athletics. Were it otherwise, the authorization to local school boards to make that *substitution* would be unnecessary. The SBE rules describing the goals, rationale, and "strands" for the physical education curriculum mention games and sports, but make no mention of interscholastic athletics. [Apx. pp. 251-53].

TSSAA's rules and regulations do not extend to the physical education curriculum required under SBE rules. TSSAA's rules pertain only to sports competition between different schools, a distinctly extra-curricular (outside the regular curriculum) activity.

ment from public funds. [R. 42 Ronnie Carter Dep. pp. 271, 291-92, Apx. pp. 264-65, 266].[2]

TSSAA's power to enforce its rules as to Brentwood Academy does not flow from the State of Tennessee or from any statute or valid regulation of any state agency or any other act of the state. TSSAA's power to enforce its rules as to Brentwood Academy flows directly and solely from the voluntary membership contract which Brentwood Academy signed, under which it agreed to comply with the TSSAA rules and decisions in order to receive the opportunity to proclaim itself a TSSAA champion.[3] Brentwood Academy's contract is with a private entity, not the state.

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[2] TSSAA is one of three private associations, along with the Tennessee Education Association and the Tennessee School Boards Association, whose employees are statutorily permitted to participate in the Tennessee Consolidated Retirement System. Tenn. Code Ann. §8-35-118. Although the employees of those three organizations are not employees of the government, the General Assembly has recognized that the three organizations often draw employees from the teaching profession. The availability of participation in TCRS is a means by which the General Assembly has permitted members of the teaching profession to leave government employment and go to work for one of these associations without losing the ability to continue accruing retirement benefits under TCRS. However, the government does not pay any portion of the employer contribution for employees of those three associations who continue to participate in TCRS.[R.42 Ronnie Carter Dep. p. 271, Apx. pp. 264-65]

[3] *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), relied upon extensively by the Petitioner in its brief, did not involve a determination that a private entity was acting under color of state law. Instead, the Court in *Lebron* concluded that Amtrak was in fact a government entity or agency. Amtrak

(Footnote 3 continued on next page)

B. TSSAA is Not a State Actor Under *Tarkanian*.[4]

In *NCAA v. Tarkanian*, 488 U.S. 179 (1988), this Court held that a private athletic association did not act under color of law when enforcing its rules against a member school. The analysis of the NCAA in *Tarkanian* applies with equal force to TSSAA. Like members of the NCAA, TSSAA members agree when joining the association that they will abide by the TSSAA rules. *Tarkanian*, 488 U.S. at 183. These rules, like NCAA rules, govern the conduct of interscholastic athletic competition among the association's members and include limitations on the recruiting of student-athletes. *Id.* Like the NCAA, TSSAA uses enforcement procedures that are an essential part of its effective functioning. *Id* at 184. The source of TSSAA's rules and enforcement procedures, like the source of the NCAA's

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(Footnote 3 continued)

was established by Congress, its structure and powers statutorily decreed by Congress. *Id.* at 383-87. Its directors were government appointees. *Id.* at 385. The Court held:

> "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400.

TSSAA was not created by special law for the furtherance of governmental objectives, nor does the state have permanent authority to appoint a majority of the Council or Board members. *Lebron* has no application here.

4 Where a deprivation of rights under the Fourteenth Amendment is alleged, the "state action" and "under color of state law" requirements converge. *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 935 n. 18 (1982).

"legislation," is the collective membership of the association. *Id.* at 193. While public school members have certainly had some impact on TSSAA's promulgation of its rules, it must be assumed that independent and parochial school members of TSSAA have participated as well in the promulgation of those rules. *Id.*[5]

In *Tarkanian*, a state institution's adoption of the NCAA's rules to govern its own behavior did not transform the NCAA into a state actor. *Id.* at 194. Drawing an analogy to *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court stated that the ABA's formulation of disciplinary rules was not state action even though the State Supreme Court adopted those rules in toto and enforced them against its members, since the State Supreme Court "retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Id.* Similarly, the State Board of Education has presumably retained the power to reexamine the TSSAA rules and, if necessary, to reject those rules and promulgate its own. This Court noted:

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[5] There is no evidence in the record that the state caused the adoption of the recruiting rule, nor is there any evidence of the makeup of the TSSAA Legislative Council when the rule was adopted. Accordingly, there is no evidence in the record to support a finding of state action in the actual promulgation of the TSSAA recruiting rule. *See e.g. Burrows v. Ohio High School Athletic Association*, 891 F.2d 122 (6th Cir. 1989) (no evidence that the adoption of OHSAA's rule in question was caused, controlled, or directed by the state or its agencies, and hence no state action in the adoption of that rule). Some of the printed guidelines used for interpreting and understanding the "recruiting rule" were developed in part by a Legislative Council member who was the headmaster of a private school and served as Vice President of the Council. [R. 42, Ronnie Carter Dep. p. 294, Apx. p. 267].

> "So here, UNLV retained the authority to withdraw from the NCAA and establish its own standards. The University alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair or unwieldy." *Id.* at 194-95.

Similarly, Brentwood Academy or any other TSSAA member school can withdraw from TSSAA and establish its own standards, or alternatively can stay in TSSAA and work to amend rules that appear harsh, unfair, or unwieldy.

Like the NCAA, TSSAA enjoys no governmental powers to facilitate its investigations, such as the power to subpoena witnesses, impose contempt sanctions, or assert sovereign authority over any individual. *Id.* at 197. While TSSAA imposed a fine upon Brentwood Academy, Brentwood Academy never found it necessary to seek any sort of stay since TSSAA had no power to levy an execution to collect the fine. Almost three years later, the fine remains unpaid.

This Court acknowledged in *Tarkanian* that the NCAA's membership included virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. *Id.* at 183. Yet, the Court rejected Tarkanian's assertion that the power of the NCAA was so great that UNLV had no practical alternative to compliance with NCAA legislation, stating:

> "[E]ven if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a

private party is therefore acting under color of state law." *Id.* at 198-99.

This Court properly recognized that the undesirability of withdrawing from membership in the NCAA and losing the ability to compete for NCAA-sponsored championship's did not make the option of withdrawal non-existent. *Id.* at 198 n. 19. It is equally true that while it may be unpalatable to Brentwood Academy to withdraw from TSSAA and no longer be in a position to garner the fame of a TSSAA football championship, Brentwood Academy nonetheless retains the option of withdrawing from TSSAA if it does not wish to comply with the TSSAA rules. It can join another existing association like the Tennessee Athletic Association of Christian Schools (TAACS), play as an independent school without joining any association, or elect not to conduct an interscholastic athletic program at all. In fact, Brentwood Academy has previously encouraged an *en mass* withdrawal of private schools from TSSAA in order to form a separate association. [R. 42 Bill Brown Dep. pp. 61-63, Ex. 10].

Ultimately, the issue in *Tarkanian*, and the issue in general in the state action analysis, was whether the power exercised by the private entity flowed from the state. Plainly in *Tarkanian* it did not. Similarly, the power exercised by TSSAA when enforcing its recruiting rule did not flow from the State of Tennessee. It flowed from Brentwood Academy's contract with TSSAA.

C. Footnote 13 in *Tarkanian* Does Not Require A Different Result.

Brentwood Academy points to one sentence of footnote 13 in *Tarkanian* as dispositive of the state

action issue here. Brentwood Academy brief pp. 30-39. After recognizing that the source of the NCAA's rules was not a particular state, Nevada, but was the collective membership speaking through an organization independent of any particular state, this Court stated in a footnote:

> "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign.... The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership." 488 U.S. at 193 n. 13 (citations omitted).

This footnote did not affect the outcome in *Tarkanian*. Moreover, the Court was addressing a hypothetical situation in the footnote, and was not "sifting facts and weighing circumstances" as required when determining whether private conduct constitutes state action. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). By sifting the facts and weighing the circumstances, it is clear that TSSAA, a private entity, did not act under color of state law when it enforced its recruiting rule against Brentwood Academy, a voluntary member school that agreed by contract with TSSAA to comply with the TSSAA rules and decisions.[6] Cer-

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[6] The first sentence of footnote 13 dealt with the source of the association's rules. There is no evidence in the record to support a finding of state action in the promulgation of the TSSAA recruiting rule in any event. *See* footnote 5, *supra*.

tainly the mere fact that all of an association's members come from a single state, and a number of those members happen to be government employees or public institutions, does not render all other facts and circumstances irrelevant in the state action analysis.

In a state where the government has assumed responsibility for the regulation of interscholastic athletics and has either created an agency to serve that function or has statutorily appointed an association to serve the function, footnote 13 may apply. However, that footnote likely was not written in anticipation of a situation like that in Tennessee, where the state has stayed out of the regulation of interscholastic athletics.

Ultimately, two elements are necessary to establish that an act was undertaken under color of state law. First, there must be a constitutional deprivation caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. This is another way of saying that the power exercised must flow from, or have its source in, the state. Second, the party charged with the deprivation must be someone who may fairly be said to be a state actor so that the unconstitutional conduct is fairly attributable to the state itself. *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. _____, 119 S.Ct. 977, 143 L.Ed.2d 130, 143-44 (1999); *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937 (1982). A person acts under color of state law for purposes of 42 U.S.C §1983 only when exercising power possessed by virtue of state law and made possible only because the person is clothed with the authority of state law. *Polk County v. Dotson*, 454 U.S. 312, 317-18 (1981)(quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

The facts and circumstances do not suggest that TSSAA, when enforcing the recruiting rule against Brentwood Academy, exercised power possessed by virtue of state law or made possible only because it was clothed with the authority of state law. There is no state law or rule of conduct giving TSSAA the power to enforce its rules against a private member school like Brentwood Academy. That power grows solely out of the contract between TSSAA and Brentwood Academy. It is power not made possible because TSSAA is clothed with any authority of state law. It is power made possible only because Brentwood Academy voluntarily elects to join TSSAA and agrees to comply with its rules and decisions. TSSAA did not act under color of state law when it enforced its recruiting rule against Brentwood Academy.[7]

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[7] Brentwood Academy treats the first sentence of footnote 13 as the defining statement in the entire *Tarkanian* decision, while discounting the significance of the second sentence of the same footnote. In fact, when the gravamen of the complaint is considered, namely that TSSAA acted contrary to the constitution when it enforced the recruiting rule against Brentwood Academy, the second sentence of footnote 13 in *Tarkanian* becomes more significant than the first. Regardless of any purported relationship between TSSAA and the State Board of Education ("SBE"), the SBE has no power or authority to govern or control the interscholastic athletic program of a private school like Brentwood Academy. Accordingly, even if the State of Tennessee had legislatively conferred upon TSSAA authority over interscholastic athletics in the public schools, TSSAA's relationship with Brentwood Academy would still remain one that grows purely out of contract. Thus, the source of TSSAA's power to enforce the recruiting rule against Brentwood Academy would remain unchanged, regardless of whether public schools were voluntary members of TSSAA or involuntary members of TSSAA.

II. TSSAA DID NOT ACT UNDER COLOR OF STATE LAW UNDER ANY OF THE TESTS CUSTOMARILY UTILIZED BY THIS COURT.

A. TSSAA Does Not Perform A Function That is Traditionally And Exclusively Reserved To The State.

The Sixth Circuit correctly concluded under the public function test that TSSAA was not a state actor because it did not exercise powers which are traditionally and exclusively reserved to the state. 180 F.3d at 763. The conduct of interscholastic athletics in Tennessee is not traditionally and exclusively reserved to the state. The State of Tennessee has never regulated interscholastic athletic competition. For the first 47 years of TSSAA's existence, the State of Tennessee undertook no role with respect to the coordination of interscholastic athletic competition. In 1972, without any legislative authorization and without TSSAA's consent, the State Board of Education adopted a resolution designating TSSAA as the organization to supervise and regulate the interscholastic athletic activities of the public junior and senior high schools in Tennessee. [R. 52, August 25, 1972, State Board of Education minutes]. Still, TSSAA never sought State Board of Education approval of its rules or by-laws, and the State Board of Education did not attempt to control the operation of TSSAA and only occasionally took action to ceremonially approve TSSAA rules. [R. 42, Ronnie Carter Dep. pp. 266-67; R. 52 Aff. of Jerome Saylors, Apx. p. 210]. At no time did the State Board of Education consider the recruiting rule in particular or any TSSAA rule in detail. [Apx. pp. 157-61, 163-65]. In 1996, prior to the events giving rise to this action, the State Board of

Education changed its rule such that it thereafter simply authorized the public schools of Tennessee to voluntarily maintain membership in TSSAA. [Administrative Rule 0520-1-2-.08 of the State Board of Education, Apx. pp. 172-174].

The mere approval of or acquiescence in the actions of the private party by the state is not sufficient to convert the private party's action into state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Even extensive and detailed state regulation would not convert the private entity's actions into state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 350 (1974). The fact that a private entity performs a public function does not makes it acts state action, absent a showing that the function has been traditionally the exclusive prerogative of the state. *Rendell-Baker*, 457 U.S. at 841; *Blum*, 457 U.S. at 1011; *Jackson*, 419 U.S. at 353. Even if interscholastic athletic competition were assumed to be a public function based on the attempted analogy to "physical education," TSSAA's regulation of that function would not convert its action into state action. There is no evidence that the state of Tennessee has ever regulated interscholastic athletic competition at all, much less exclusively.

The absence of the feature of exclusivity is fatal to the public function theory of state action. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 159 (1978). The SBE's ceremonial approval of TSSAA's rules between 1972 and 1995 does not add the feature of exclusivity needed to convert TSSAA's action into state action. This action by the SBE represented, at most, acquiescence in TSSAA's actions. *See Flagg Brothers*, 436 U.S. at 164-65. Where the SBE has not put its own weight on the

side of the rules by ordering them, its approval of the rules will not transmute TSSAA's enforcement of its own rules into state action. *Jackson*, 419 U.S. at 357.

In order to avoid the absence of exclusivity, the Petitioner relies upon the theory that the state has delegated to TSSAA the authority TSSAA exercises. *See* Brentwood Academy brief pp. 39-46. It is true that the government cannot avoid its constitutional accountability by delegating to private parties the provision of services that a state's constitution or statutory scheme obligates the state to provide. *Sullivan*, 143 L.Ed.2d at 130. However, what is missing from the petitioner's argument is the underlying requirement of a constitutional or statutory obligation imposed upon the state. Neither the constitution of Tennessee nor any Tennessee statute imposes upon the state or any local government entity an obligation to provide for interscholastic athletic competition at all, much less for the coordination of that competition provided by TSSAA.

The Supreme Court of Tennessee has determined that the constitution of Tennessee imposes a duty upon the state to maintain a system of public education. However, no court in Tennessee has ever construed the constitution to impose upon the government a duty to provide for any particular types of extracurricular activities in the public schools. Instead, the Supreme Court of Tennessee has held that high school students in Tennessee have no legally recognized right to participate in interscholastic athletics. *Tennessee Secondary School Athletic Association v. Cox, supra*, 425 S.W.2d at 602. There is no federal constitutional right to education. *Martinez v. Bynam*, 461 U.S. 321 (1983); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). There certainly is no constitutional right

to attend a private school like Brentwood Academy, and as the Sixth Circuit has repeatedly held, there is no constitutional right to participate in interscholastic athletics. *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265 (6th Cir. 1994); *Burrows v. Ohio High School Athletic Association, supra*; *Hamilton v. TSSAA*, 552 F2d 681 (6th Cir. 1976).

B. The State Has Not So Coerced Or Encouraged TSSAA To Act That the Choice Of TSSAA Must Be Regarded As That of the State.

The Sixth Circuit rejected Brentwood Academy's contentions under the "state compulsion" test, noting that the Tennessee legislature had never mentioned TSSAA, much less given it any authority. 180 F.3d at 763-64. The SBE's 1972 administrative rule, upon which the Petitioner heavily relies, does not establish state compulsion. The SBE rule was not promulgated until 1972, after TSSAA had been performing its function for 47 years. The rule did not alter the way in which TSSAA conducted its business.

The rule was repealed and replaced by a new rule, simply authorizing the public schools of Tennessee to join TSSAA, prior to any of the events giving rise to this action. Even if the rule suggested that the state somehow regulated TSSAA's conduct for the 24 years in which the rule existed, such regulation, even if extensive and detailed, would not convert TSSAA's action into that of the state. *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 841; *Jackson*, 419 U.S. at 350. Similarly, the fact that TSSAA receives some funds from gate receipts generated through tournaments held in publicly-owned facilities or from

dues paid by public school members does not establish state action. Substantial or even total dependence upon state funding would not render TSSAA's enforcement of the recruiting rule an act of the state. *Rendell-Baker*, 457 U.S. at 841.

In any event, there is no evidence that the state played any part in TSSAA's enforcement of the recruiting rule against Brentwood Academy. The state neither coerced nor encouraged TSSAA's enforcement in any way, and thus certainly did not "compel" the private action TSSAA took here.

C. No Symbiotic Relationship Exists Between TSSAA and the State.

The third test of state action examined and rejected by the Sixth Circuit was the "symbiotic relationship" test. The Sixth Circuit correctly noted that a symbiotic relationship exists only when there is a sufficiently close nexus between the state and the challenged action of the private party so that the action of the private party can be fairly treated as that of the state. Neither extensive regulation nor state funding of a private entity is sufficient to support a finding of a symbiotic relationship. Relying on its earlier decision in *Burrows*, the Sixth Circuit held that there was no proof that TSSAA's enforcement of its recruiting rule against Brentwood Academy was caused, controlled, or directed by the state or its agencies. 180 F.3d at 764.

The Petitioner erroneously relies upon the symbiotic relationship analysis in *Burton*. In *Jackson*, this Court limited the holding of *Burton* to its peculiar facts, involving a private lessee of public property. *Jackson*, 419 U.S. at 357-58. In addition, where a privately

owned enterprise is providing a service that the state would not necessarily provide, even though under contract with or extensively regulated by the state, that enterprise does not fall within the ambit of *Burton. Blum*, 457 U.S. at 1011.

TSSAA was not acting as a lessee of public property when it enforced its recruiting rule. While TSSAA may occasionally lease public property for the conduct of championship tournaments, there is no relationship between the lease and the act at issue, enforcement of the recruiting rule. There is no claim that TSSAA somehow acts in a discriminatory fashion when it conducts its state championship tournaments. There is no evidence that the state somehow derives monetary benefit, as an occasional lessor of public property to TSSAA, from TSSAA's enforcement of its recruiting rule. The mere fact that TSSAA signs a contract with the state to use a publicly-owned facility for a tournament does not deliver the "symbiotic relationship" test to the Petitioner. Otherwise, a one-time lessee of public property could be sued under §1983 for any alleged unconstitutional act, regardless of how unrelated that act might be to the lease of public property.

D. TSSAA Is Not A Joint Participant in State Action.

At the time the recruiting rule was enforced against Brentwood Academy in 1997, the elected members of the TSSAA Board of Control held jobs as principals of public schools. In insisting that this fact is dispositive of the state action issue, the Petitioner apparently relies upon the "joint participation" theory of state action found under *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982), in the context of misuse of the state's

attachment statutes. In *Lugar* the Court found state action to exist because the pre-judgment attachment in question was obtained pursuant to state law, and state officials actually attached the property, so that there was action by the state or its agents jointly with the private party. *Id.* at 941-42. However, the existence of a state-enforced law or a custom having the force of law is essential to a determination that a private person is liable as a joint participant with the state in an unconstitutional act. *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 173-74 n. 44 (1970).

It is true that an individual must be a principal or assistant principal (or headmaster) of a member school to be eligible for election to the Board of Control or Legislative Council. It is also true that some Board of Control meetings are held on school days, although the Petitioner's assertion that schools "typically" reimburse their principals for attending such meetings finds no support in the record excerpts cited. *See* Brentwood Academy brief p. 6. Given these facts, Brentwood Academy's suggestion that the presence of public school principals on the Board of Control creates "joint participation" has some superficial appeal.

However, a distinction must be made between eligibility for the Board and function as a member of the Board. As the Petitioner acknowledges, the determination of whether an organization controlled by public employees acts under color of state law is based on a functional analysis. Brentwood Academy brief p. 34. When serving on the Board of Control, an individual is not functioning as the principal of a school. The statutory duties of a public school principal include no reference to interscholastic athletics. *See* Tenn. Code Ann. §49-2-303(b). A Board of Control member, elected by the

heads of other member schools both public and private, functions in a representative capacity. The Board member represents the interests of every school, public or private, in the district from which that member is elected. *See Whitcomb v. Chavis*, 403 U.S. 124, 141 (1971); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Whether the Board member's job is as principal of a public school or headmaster of a private school makes no difference in the functional analysis.

Just as shareholders in a for-profit corporation elect the Board of Directors, the members of TSSAA elect the Board of Control. The Board of Control functions in a representative capacity. Brentwood Academy's suggestion that the public or private status of the school at which those representatives are employed is determinative of TSSAA's state actor status would lead to confusing and inconsistent results. For example, if, unlike Brentwood Academy Headmaster Bill Brown, a substantial number of principals or headmasters at other private TSSAA member schools sought election to the Board of Control and succeeded in filling a majority of those seats, TSSAA would no longer be a state actor. If a majority of the members of the Legislative Council were public school principals, and a majority of the members of the Board of Control were private school principals, TSSAA would be a state actor when enacting its rules but not when enforcing those rules. Taken a step further, the Petitioner's analysis would require the conclusion that a public school principal serving as a game official in a TSSAA basketball tournament could be subject to constitutional challenge on the theory that his job as a public school educator rendered him a "state actor" when engaging in a TSSAA-related endeavor. A coach holding a player out of a game due to an unre-

solved eligibility issue would be a "joint participant" with TSSAA in state action. This sort of confusion might be acceptable to Brentwood Academy if it means a victory in this case, but it would only add to the difficulty of the state action analysis to be performed by the lower courts in subsequent cases. Moreover, Brentwood Academy's analysis would foster chaos in the conduct of interscholastic athletics in Tennessee.

Certainly more than the mere involvement of an individual who holds government employment is necessary to convert the act of a private entity into state action. It is the function served by that individual that determines whether he is acting under color of state law. Indeed, Brentwood Academy's argument wholly ignores the nature of representative government. In any organization with a representative form of governance, there are likely to be minority groups. The Petitioner's argument is that a minority group can only be represented if its elected representative is also a member of that minority group. Applied to government, the Petitioner's argument would require a presumption that a white congressman elected from a congressional district where the majority of the population is white cannot represent the interests of his African-American constituents. A United States Senator, required to be 30 years of age or older to qualify for election, would be presumed unable to represent the interests of those under 30.

But the congressman does not serve as a white male, he serves as a congressman. The senator does not serve as a 30-year-old, he serves as a senator. The Board of Control members do not serve as principals of public schools or private schools. They serve as Board of Control members. Simply because there are more

public school members in TSSAA than there are private school members, there is statistically a greater likelihood that a majority of the members of the Board of Control, at any given time, will be principals of public schools. That fact does not render TSSAA a state actor.[8]

III. THE STATE ACTION ANALYSIS: FROM WHENCE DOES THE POWER FLOW?

Under the various tests for state action that have been used by the courts, the source of the power exercised by the private entity determines the outcome. The various tests provide vehicles for answering the question: From whence does the power flow? If the power exercised by the private entity flows directly from the state, and the private party is a person who may fairly be said to be a state actor so that the conduct may be fairly attributable to the state, then the private entity acts under color of state law. *Sullivan*, 143 L.Ed.2d at 143-44.

Sifting through the facts and circumstances, it is clear that TSSAA's power to enforce the recruiting rule against

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[8] The Petitioner and *amici curiae* in support of the Petitioner suggest that there is some tension between public schools and private schools because of a theoretical desire by public schools to prevent students with athletic prowess from attending private schools or a desire by public school officials to prevent private schools from effectively offering private educational alternatives. These are broad and sweeping philosophical generalizations that cannot be supported by some isolated comment of one public school principal that might be found somewhere in the record. These assertions by the Petitioner are more evidence of the Petitioner's generalized prejudice toward public schools than of any pervasive public school prejudice against private schools.

Brentwood Academy did not flow from the state. The power did not have as its source a right or privilege created by the state. The source of the power exercised by TSSAA as to Brentwood Academy in 1997 was the contract between TSSAA and Brentwood Academy.

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 482 U.S. 522 (1987), this Court stated that "[n]either the conduct nor the coordination of amateur sports has been a traditional government function." *Id.* at 545. The Court held that the USOC's enforcement of its exclusive right to the word "Olympic" did not violate the Fifth Amendment because the USOC was not a government actor to which constitutional prohibitions applied.

The USOC is a federally created private corporation. Congress granted the USOC a corporate charter, imposed various requirements upon the USOC, and provided for USOC funding through the exclusive use of Olympic words and symbols and through direct grants. *Id.* at 542-43. The activities performed by USOC serve a national interest, as its purpose of incorporation indicates. *Id.* at 544. Nonetheless, this Court found that the USOC's enforcement of its right to the use of the word "Olympic" was not governmental action. Reiterating that the government normally could be held responsible for a private decision only where the government exercised coercive power or provided such significant encouragement that the choice must in law be deemed to be that of the government, the Court stated:

> "The USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision. There is no evidence that the Federal Government coerced or encouraged the

> USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise 'mere approval of or acquiescence in the initiatives' of the USOC. This is not enough to make the USOC's actions those of the government." *Id.* at 547 (citations omitted).

The Court found no evidence that the government could or did exert any influence over the exercise of USOC's enforcement decision, and that there was therefore no evidence of a close nexus between the government and the challenged actions of the USOC. *Id.* at 547 n. 29.

This Court's analysis in *San Francisco Arts & Athletics* applies with equal force in this case.[9] There is no evidence here that the state exerted any influence over the exercise of TSSAA's enforcement decisions as to Brentwood Academy. There is no evidence that the state exercised coercive power or provided such significant encouragement in the enforcement decision that the decision must in law be deemed to be that of the state. And TSSAA has fewer regulatory and financial connections with the state in this case than existed between the government and the USOC. There are no facts which warrant treating the enforcement of the recruiting rule as to Brentwood Academy by TSSAA, a private party, as action taken under color of state law. TSSAA's choice of how to enforce its recruiting role "simply is not a governmental decision." *Id* at 547.

From whence did TSSAA's power to enforce its rule as to Brentwood Academy flow? It flowed from a private

[9] Brentwood Academy omits all mention of this Court's decision in *San Francisco Arts & Athletics* in its brief.

contract between private parties. It did not flow from the state.

IV. THE PETITIONER OFFERS NO COMPELLING POLICY REASON TO EXPAND THE STATE ACTION CONCEPT TO REACH TSSAA.

TSSAA is a private entity. Constitutional constraints should be imposed upon a private entity like TSSAA only with caution. In *Lugar*, this Court stated:

> "As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.' . . . . Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." 457 U.S. at 936 (citations omitted).

As previously discussed, the 1972 State Board of Education Administrative Rule is not a basis for a finding of state action by TSSAA. The attempted analogy between interscholastic athletics and the physical education curriculum, a part of the public function argument, does not support a finding that TSSAA is a state actor. The symbiotic relationship analysis is unavailing to the

Petitioner. The fact that non-membership in TSSAA and the resulting inability to compete for TSSAA championships is unpalatable to a high school football power like Brentwood Academy does not convert TSSAA's enforcement of the recruiting rule into state action. TSSAA's limited receipt of funds from public sources does not render its enforcement of the recruiting rule an act of the state. Occasional ceremonial approval by the SBE of the TSSAA rules does not transmute TSSAA's enforcement of its rules into state action. Without any constitutional or statutory obligation imposed upon the state to provide for the regulation of interscholastic athletic competition or any other extracurricular activity, the asserted delegation of authority by the State Board of Education to TSSAA is unavailing to the Petitioner. And the election of Board of Control members who are public school principals does not establish state action.

After sifting the facts from the Petitioner's arguments and theories, the Petitioner is left simply with policy reasons why TSSAA should purportedly be found to be a state actor. The Petitioner and various *amici curiae* in support of the Petitioner express concern over a possible lack of "accountability" if TSSAA is not found to be a state actor. *See* Brentwood Academy brief, pp. 26-27. However, there is no general law or rule of constitutional accountability. Instead, where a private actor is concerned, the general rule is that there is no constitutional accountability unless state action is found. The Constitution leaves a substantial area of freedom without constitutional restraint.

The "accountability" concern also ignores reality. A public school student who suffers discrimination as a result of her school's decision to follow a particular

TSSAA rule can pursue an action against the public school she attends under §1983 or Title IX. *See e.g. Tarkanian* (UNLV subject to suit under §1983 even though NCAA was not). Just as the Petitioner and others rely upon the large number of public schools in TSSAA's membership to support their arguments, they must also acknowledge that the potential for constitutional liability among those schools due to following a TSSAA rule would likely lead to either an *en mass* withdrawal from the association or an amendment of the rule.

Among private schools, students retain the right to seek relief under Title IX from a school that receives federal funds. Admittedly, a private school student may not enjoy a full range of constitutional protections. That is by design of those who establish a private school like Brentwood Academy and by choice of the parents who enroll their children there. However, it is illogical to suggest that the student's range of constitutional rights should be expanded simply because the school voluntarily joins TSSAA. The result would be that such a student would enjoy constitutional protection of her "right" to play basketball if her school joined TSSAA, but not if the school elected to compete without joining TSSAA. The student whose private school joined TSSAA would be afforded greater rights on the athletic field than in the classroom.

Simply put, students do not lose any rights they would otherwise have simply by virtue of the decisions of their schools to join TSSAA. What the Petitioner and *amici curiae* on behalf of the Petitioner propose is not a preservation of student rights that may otherwise be lost, but instead an expansion of student rights. There is no presumption in the law to suggest that any activity

which a given individual might deem important should be treated as a right subject to constitutional protection.

Finally, the Petitioner suggests that a decision in TSSAA's favor here would upset settled law because a number of courts have previously held that state high school athletic associations were state actors. The fact that a number of lower courts may have previously assumed or held that state high school athletic associations were state actors, generally without conducting any real analysis of the issue, is no reason for this Court to hold TSSAA to be a state actor. In *Tarkanian* this Court noted that for years the federal courts of appeals had held that the NCAA was a state actor under §1983, until the Court's decisions in *Lugar*, *Rendell-Baker* and *Blum* led the lower courts to reconsider. *Tarkanian*, 488 U.S. at 182 n. 5. Just as this Court's 1982 state action decisions caused lower courts to re-examine the state actor status of the NCAA, re-examination of the state actor status of state high school athletic associations is also warranted. Indeed, as the brief of *amici curiae* State Interscholastic Associations, et al., reflects, the variations in organizational structure and state government involvement from one association to another counsel against the sort of blanket rule proposed by the Petitioner, a rule that would be made without the necessary sifting of facts and weighing of circumstances and without attention to the gravamen of the complaint.

V. THE DANGER OF EXPANDING THE STATE ACTION CONCEPT.

Contrary to the "accountability concern" expressed by the Petitioner, this Court has recognized that "our political order" requires that courts respect the limits of their authority over

private interests. The Petitioner urges a finding of state action that departs from the principles this Court has used to insure that constitutional requirements are imposed only upon those whose conduct may be fairly attributed to the state. Instead, the Petitioner urges this Court to find TSSAA to be a state actor because the elected members of its Board of Control are principals of public schools.

The ramifications of finding state action based on the makeup of the Board of Control are dangerous. Each year TSSAA, like its counterparts in other states, makes hundreds of eligibility determinations with respect to individual student-athletes. A holding that TSSAA is a state actor would convert each of those eligibility determinations into a potential constitutional claim in the federal courts. The rationale supporting the Petitioner's state action argument could be extended to encompass the decisions of game officials who happen to be employed as public school teachers. It could encompass decisions by coaches at public schools about whom to cut from the roster and whom to play at what position in any given athletic contest. Essentially, every matter involving interscholastic athletics at public schools could give rise to a constitutional claim because of a public employee's role in the decision-making process.

But the ramifications of the Petitioner's argument extend far beyond interscholastic athletics. There are any number of high school extracurricular activities and competitions in which administrative bodies have greater numbers of individuals employed in the public schools than in the private schools, simply because there are more public secondary schools. There are many organizations that foster activities, enforce rules,

and sponsor extracurricular competition between schools in agriculture, mathematics, music, marching band, forensics, moot court, cheerleading, and other activities. Under the Petitioner's proposed test for state action, the presence of a majority of public school employees on the governing body of the organizations sponsoring these competitive extracurricular activities would require a finding of state action. Constitutional protection would extend to participation in virtually any extracurricular activity, opening the floodgates of potential litigation arising out of extracurricular activities.

A determination that TSSAA is a state actor would also leave existence of a constitutional claim pertaining to extracurricular activities like sports, band, or even the chess club, to be determined based upon the employment status of those in governing positions at any given time. What might appear as a constitutional claim today could be rendered a claim without constitutional recourse next year if enough private school employees are elected to form a majority on the Board of Control. Then again, even if five of the nine Board of Control members were private school principals or headmasters, a six to three vote to take action against a member school for violating the recruiting rule could still be construed as state action if public school principals represented a majority of those voting to take the action.

Amicus curiae Tennessee Lawyers' Association for Women mentions *Crocker v. TSSAA* as a case which evidences a pattern of bad behavior on TSSAA's part. In fact, *Crocker v. TSSAA* arose out of the efforts of a family to avoid the effect of the TSSAA transfer rule on their child. Although the child plainly changed schools for reasons related to athletics, the parents of that child attempted to utilize the Individuals with Disabilities

Education Act, 20 U.S.C. §§1400 *et seq.*, to get around the TSSAA eligibility rules. The *Crocker* litigation found its way to the Sixth Circuit four times. On the last occasion, affirming a grant of summary judgment to TSSAA after young Michael Crocker had managed to play throughout his high school years by virtue of two improvidently granted restraining orders, the Sixth Circuit said:

> "Although under the circumstances the organization [TSSAA] may appear stubborn and inflexible in its conduct, it is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life. The main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Crocker v. TSSAA*, 980 F.2d 382, 386-87 (6th Cir. 1992).

It required four trips to the Sixth Circuit before that Court finally perceived that the plaintiff in *Crocker* was utilizing a well-intended federal law simply as a vehicle to avoid having to comply with TSSAA rules. It took four visits to the Sixth Circuit before The Honorable Nathanial R. Jones, Sixth Circuit Judge, who sat on the panel for each of the four appeals, questioned in oral argument what the founding fathers of our country would think if they saw how the federal court system was being put to use.

This case, although brought by a school instead of a student, surely represents the same problem the Sixth Circuit identified in *Crocker*. It is a problem that is fast becoming endemic to life in America. Athletes are

becoming the most recognized and admired members of society. Athletics have become, in many segments of society, the new religion. The passion and emotion that accompanies athletic participation can sometimes lead to extraordinary measures, like those taken by the Crocker family and like those taken in this case by Brentwood Academy. A decision that TSSAA is a state actor will have ramifications across the country and will undoubtedly lead to a proliferation of federal court litigation over high school sports.

Ultimately, the state action inquiry is not only about whether a private entity like TSSAA can be held to constitutional standards, but also about whether the state can be held accountable for the private entity's conduct. Although the state was not sued by Brentwood Academy in this case, a determination that TSSAA acted under color of state law would undoubtedly invite direct government intervention in the coordination of interscholastic athletic competition among the public schools. Certainly the government is not likely to accept potential liability for the acts of TSSAA and, at the same time, continue to acquiesce in TSSAA's control over those situations giving rise to that liability. The result would be that a private system that has worked quite well for 75 years would be converted into a new form of governmental regulation with increased bureaucracy, increased potential for abuse of power, and increased public expense. The bureaucracy and expense would be substantial as states like Tennessee would not only assume responsibility for rule enforcement for all types of extracurricular activities, but they would also have to undertake legal review of all rules and all enforcement decisions and would have to finance the defense of their actions in federal court. And of course, another likely

result would be the total exclusion of private schools from all interscholastic competition with the public schools, since the state would not likely accept potential constitutional liability to a school like Brentwood Academy over which it has no governmental authority.

Constitutional standards should only be invoked "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004 (emphasis in original). A state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State itself. *Id.*; *McCormack v. National Collegiate Association*, 845 F.2d 1338, 1346 (5th Cir. 1988). The fact that many or even a majority of TSSAA's members may be public schools does not satisfy this test. *McCormack*, 845 F.2d at 1346. There is no evidence that the decision of TSSAA to enforce its recruiting rule against Brentwood Academy was compelled or influenced by government regulation which would justify attributing the action of TSSAA to the state. *Rendell-Baker*, 457 U.S. at 841; *Ponce v. Basketball Federation of the Commonwealth of Puerto Rico*, 760 F.2d 375, 379 (1st Cir. 1985).

The state of Tennessee has elected not to insert itself into an area where its power is not needed. Tennessee has enjoyed a successful 75 year evolution of interscholastic athletic competition among public, private, and parochial schools without state government interference. Throughout this time, Tennessee has opted not to impose government regulations. Other states have decided differently. The state of Tennessee should be

free to allocate its resources elsewhere rather than being forced to take constitutional responsibility for the private actions of TSSAA.

CONCLUSION

Amicus curiae Southeast Law Institute acknowledges that an association like TSSAA "may make rules to which the school who wishes to participate must agree, otherwise, they should not join the association." *Amicus curiae* Southeast Law Institute brief p. 11. Brentwood Academy joined TSSAA of its own volition, renewed its membership annually, and agreed to comply with the TSSAA by-laws and the decisions of the Board of Control. Brentwood Academy wants to be a member of an organization of 350 schools, all of which have voluntarily agreed to play by the same set of rules, so that it can call itself the TSSAA state football champion. At the same time, Brentwood Academy wants to enjoy the luxury of rewriting to suit itself those rules it does not like, despite the wishes of the other 349 member schools in the association. Brentwood Academy wants to win TSSAA state football championships playing by its own rules.

Ultimately, the various tests for state action serve as guides for determining whether the private party's action is actually an exercise of state government power. In this case, TSSAA's power to enforce its recruiting rule against Brentwood Academy did not flow from the state of Tennessee. TSSAA's power flowed from Brentwood Academy's voluntary membership in TSSAA.

To borrow a phrase from a district court decision relied on by the Petitioner, the assertion that TSSAA acted under color of state law is "empty formalism."

Communities for Equity v. MHSAA, 80 F.Supp. 2d 729, 734 (W.D. Mich. 2000). Carter and TSSAA did not act under color of state law in the enforcement of the TSSAA recruiting rule against Brentwood Academy. The decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. Areas No Longer Analytically Contested or Matters Influenced By Subsequent Decisions of This Court

At the outset, it is appropriate for petitioner to highlight some points that, as a result of respondents' submission, are no longer in contention, or, as a result of subsequent decisions of this Court, are viewed in a brighter light.

1. The court of appeals found not "controlling" this Court's "comments" in footnote 13 in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), that the regulatory conduct of high school athletic associations largely composed of and controlled by public institutions from within a single state would constitute state action. 180 F.3d at 766. The rationale of the court of appeals was that "all nine justices agreed that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" *Id.* That analysis "misapplies the reasoning in *Tarkanian*." *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d 729, 742 (W.D. Mich. 2000). See Brief of Petitioner at 36-39. In their brief, respondents no longer defend the court of appeals' analysis of footnote 13, which analysis should be viewed as discredited.

2. Respondents do not contest the point made by Judge Merritt in his dissent to the denial of the petition for rehearing *en banc,* 190 F.3d at 707, that the decision of the court of appeals is out of sync with every other appellate court to decide the state action status of the regulatory conduct of high school athletic associations. See Brief for Petitioner at 16-19. In its *amicus curiae* brief in support of

petitioner, the United States reinforces this point: "With the exception of the court below, the courts of appeals have uniformly held that athletic associations composed primarily of public schools are state actors." Brief for the United States at 14. Neither respondents nor their *amici* cite appellate authority from outside the Sixth Circuit supporting the state-action holding of the court of appeals in this case regarding the state-action status of the regulatory conduct of a high athletic association.

This makes rather hollow the claim by respondents and their association *amici* that reversal of the court of appeals herein would open the "floodgates of potential litigation arising out of extracurricular activities." Brief of Respondents at 33. *See also* Brief of Interscholastic Associations at 7. The regulatory conduct of these associations has been considered state action for over thirty years, plenty of time for evidence to accrue. Respondents and their *amici* can do no more than make unsubstantiated pie-in-the-sky, Chicken-Little-type statements about the fear of federal court litigation. Such non-meritorious litigation has not proliferated. The reason is that the courts have adopted substantive doctrines under equal protection and due process that, properly, defer to the rational regulatory judgments of these associations. *See, e.g., Walsh v. Louisiana High Sch. Athletic Ass'n*, 616 F.2d 152 (5th Cir. 1980).[1] This discourages inappropriate or unwarranted litigation.[2] For further elaboration of this point, see Brief of

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[1] *Cf. Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (requiring showing of actual notice and deliberate indifference before school district can be held liable for damages under Title IX).

[2] Such deference would be inappropriate in a first amendment challenge such as the one underlying the litigation herein. Petitioner has been able to identify only one similar first-amendment-based lawsuit, *Holy Cross College, Inc. v. Louisiana High Sch. Athletic Ass'n*, 632 F.2d 1287 (5th

Chester E. Finn, Jr. and Daniel Casse, CP 6-8-E [references to the Petition for Writ of Certiorari and its appendices are cited herein with a CP prefix].

3. For the court of appeals, the formal revocation by the State Board of Education (SBE) of its "designation of TSSAA to regulate and organize interscholastic athletics" was "fundamental" in distinguishing earlier circuit precedent. 180 F.3d at 765-66. The formal revocation of TSSAA designation by SBE was determinative for the court of appeals, even though the district court had found that "[n]othing about the function of TSSAA has changed" and that there was no change in the "actual conduct of the TSSAA." CP 26-27-B. The court of appeals did not consider the functional realities or the ongoing effect of past state involvement.[3]

In his dissent, Judge Merritt criticized the failure of the court of appeals to engage in a "'functional' analysis of

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Cir. 1980), even though the regulatory conduct of high school athletic associations is considered state action in the third, fourth, fifth, seventh, eighth, ninth, tenth, and eleventh circuits, as well as in numerous individual states. See Brief for Petitioner at 17-19 & nn. 8-12; Brief for the United States at 14 & n.2.

[3] *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 2000 U.S. LEXIS 4154, at *33-34 (noting importance of practical reality of ongoing effect of past policy, despite nominal change in policy). In *Santa Fe*, this Court observed that no new election was conducted under the new policy regarding student-led prayer; the results of the election under the ostensibly superseded policy remained in effect. The same occurred when TSSAA was no longer formally designated by SBE to regulate interscholastic athletics as SBE's agent. When that formal designation was changed to recognition, nothing of substance changed. The TSSAA did not engage in any substantive review of its rules, policies or procedures, including the Recruiting Rule under challenge. The same previously SBE-approved rules remained in effect without review, even after the formal designation ostensibly terminated. CP 26-27-B.

the private ... agency in question to determine the degree of 'cooperation' between state and local officials and the actor...." 190 F.3d at 707. In its brief, petitioner criticized the lack of a functional analysis on the part of the court of appeals. See Brief of Petitioner at 44-46 & n.44; 34-36 & n.36. Respondents now apparently concede that a functional analysis is appropriate in determining state action. Brief of Respondents at 22 ("[T]he determination of whether an organization controlled by public employees acts under color of state law is based on a functional analysis"); 24 (the "function served" by an individual "determines whether he is acting under color of state law"). *See West v. Atkins*, 487 U.S. 42, 55-56 (1988)("It is the ... function within the system, not the precise terms of ... employment" that determines whether conduct "can fairly be attributed to the State"). *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267-69 (1991)(constitutional status turns on functional realities); *Santa Fe Indep. Sch. Dist. v. Doe*, 2000 U.S. LEXIS 4154, at *26 ("realities of the situation" control constitutional analysis).

4. Respondents contend that "[t]he absence of the feature of exclusivity is fatal to the public function theory of state action." Brief of Respondents at 17. *Amici* Interscholastic Associations likewise focus on this state action theory. Brief of Interscholastic Associations at 12-15. Both in its Petition for Writ of Certiorari and in its brief, petitioner has eschewed reliance on the "public function" theory of state action. CP 29 n.18; Brief of Petitioner at 45 n.43. No showing of exclusivity is required under the applicable theories. *Compare Georgia v. McCollum*, 505 U.S. 42, 51-53 (1992), and *Edmonson v. Leesville Concrete*

Co., Inc., 500 U.S. 614, 621-28 (1991) *with id.* at 639-40 (O'Connor, J., dissenting).

5. The constitutional significance of extracurricular activities as an integral part of the educational process – and particularly high school football – can no longer be doubted. *See Santa Fe Indep. Sch. Dist. v. Doe*, 2000 U.S. LEXIS 4154, at *37-38; *Board of Regents v. Southworth*, 120 S. Ct. 1346, 1356-57 (2000). In *Santa Fe*, 2000 U.S. LEXIS 4154, at *38, this Court recognized that "[h]igh school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause." The "traditional indicia of school sporting events ... generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot." At these games, the "school's name is likely written in large print across the field and on banners and flags." Further, "[t]he crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name." *Id.* at *31. In sum, interscholastic athletic contests "take place on government property at government-sponsored school-related events." *Id.* at *21-22. They are identified with, inextricably intertwined with, and cannot be separated from the school's overall educational program.[4] Whether

[4] See Brief of Chester E. Finn, Jr. and Daniel Casse, CP 10-11-E ("Extracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds.... [E]xtracurricular activities constitute an integral component of an overall education for most youngsters.... Students learn in different ways, but one essential ingredient is motivation..... [E]xtracurricular activities such as athletics are important as a way of motivating young people....

participation by schools in interscholastic athletic contests is voluntary or whether participation by individual public school students is deemed fundamental is immaterial.[5]

6. School choice and access to quality education are core concerns underlying this litigation. See CP 11-14; Brief for Petitioner at 24-26; Brief of Chester E. Finn, Jr. and Daniel Casse, CP 9-12-E. As the district court found, the state has an appropriate interest in preventing coercion or fraud but not in eliminating the flow of information that could inform school choice for students and their parents. CP 45-46-B. The liberty interest of parents in the "care, custody, and control of their children," first established in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v.*

Athletics can provide ... exposure to ideas and the motivation to learn. They, like art, drama, and journalism, can serve as the hook to get the attention of students and rivet it on the core curricular mission of the schools").

[5] Extracurricular activity is also important in a university's educational setting. In *Southworth*, this Court recently noted a university's strong interest in supporting students' speech in "their extracurricular campus life." 120 S. Ct. at 1356. If, however, a university supports that extracurricular speech by the imposition of mandatory activity fees, the university must "provide ... protection to its students' First Amendment interests" by respecting the principle of viewpoint neutrality. *Id.* A student referendum that substitutes "majority determinations for viewpoint neutrality" does not pass constitutional muster. *Id.* at 1357.

In this case, Tennessee's public schools have authorized TSSAA to regulate the speech of its members, including petitioner. Under *Southworth*, strong first amendment interests are at stake when TSSAA, as the agent for all the public schools in the state that field interscholastic athletic teams, suppresses the speech of one of its minority (*i.e.*, private school) members. That interscholastic athletics constitute an extracurricular component of the educational program of the high school members of TSSAA does not denigrate the significance of the state's role or the significance of the first amendment interests at stake.

Society of Sisters, 268 U.S. 510, 534-35 (1925), has recently been reaffirmed by this Court. *See Troxel v. Granville*, 2000 U.S. LEXIS 3767, at *18; *id.* at *40-42 (Thomas, J., concurring); *id.* at *67 (Kennedy, J., dissenting).

This reaffirmation makes clear the stakes for parents in having access to information regarding educational opportunity for their children. Access to information about alternative educational opportunities is the key underlying first amendment issue in this case. The Recruiting Rule adopted and enforced by TSSAA as agent for all public schools in Tennessee that play interscholastic athletics is a barrier to information on educational opportunity – a barrier that clearly would be subject to constitutional scrutiny if adopted by any single public school to determine which schools it would compete against in interscholastic athletics.

TSSAA's position is that, by acting collectively and organizing themselves into a nominally private corporate form, the public schools that control TSSAA can avoid constitutional scrutiny of their inhibitions on speech. *But see Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 397 (1995)("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form").

Petitioner contends that TSSAA's regulatory conduct is subject to constitutional scrutiny. TSSAA's rules and regulations govern the conduct of interscholastic competition among all Tennessee's public schools and among all private schools that wish to play competitively against a public school team.[6] TSSAA's regulatory conduct is controlled by

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[6] Only through membership in TSSAA is any private school assured of the ability to compete in interscholastic athletics against any public school in Tennessee. Compare Article III, Section 1(a) of TSSAA's by-

public schools and public school officials acting in their official capacity. TSSAA's rules and regulations govern access to an important public resource – the ability of any school to play interscholastic athletics with all of Tennessee's public schools. TSSAA is the regulator of interscholastic athletics as the agent of Tennessee's public schools,[7] and TSSAA's regulatory conduct is fairly attributable to the state as the "State [or local government] cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).

II. The Source of Authority Issue

Under this Court's state action cases, an alleged constitutional deprivation must be "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." In addition, "the party charged with the deprivation must be a person who may fairly be said to be a

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laws, which blanketly authorizes play with TSSAA members, with Section 1(e), which requires game-by-game written approval of TSSAA's Executive Director for games between TSSAA members and non-members. Under Section 1(e), the Executive Director has virtually unconstrained discretion to approve or disapprove individual games between TSSAA members and non-member private schools. Certain TSSAA rules and regulations must specifically be complied with in order for a non-member private school to be eligible for approval under Section 1(e). JA-126-27

[7] As TSSAA members, public schools delegate regulatory authority to TSSAA and are subject to TSSAA rules. Thus, under Article II, Section 29 of TSSAA's by-laws, TSSAA's eligibility rules are binding on TSSAA members and "shall not be set aside by mutual agreement for any contests whatsoever nor shall they be supplemented in any contest held under the jurisdiction of this Association." JA-122-23.

state actor." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 985 (1999)(quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

Respondents contend that the first prong of this analysis is not satisfied because "[t]here is no state law or rule of conduct giving TSSAA the power to enforce its rules against a private member school like Brentwood Academy." According to respondents, TSSAA's power flows from the "contract between TSSAA and Brentwood Academy" not from "any authority of state law." Since Brentwood Academy "voluntarily elects to join TSSAA," respondents contend that "TSSAA did not act under color of state law when it enforced its recruiting rule against Brentwood Academy." Brief of Respondents at 15.

Respondents' contention in this regard is flawed for four reasons.

A. The Voluntariness Issue

Respondents contend that petitioner's ostensibly voluntary participation in TSSAA means that TSSAA's enforcement of its rules against petitioner cannot have its source in state law. This contention cuts with much too broad a swath and is inconsistent with this Court's cases.

Private parties seeking licensure from the state are not compelled by state law to pursue their calling. They voluntarily seek approval from the state to pursue their business or their profession. The state's regulatory conduct has its source in state law and is subject to constitutional scrutiny despite the voluntary nature of the private party's application. *See, e.g., Bates v. State Bar*, 433 U.S. 350 (1977).

Similarly, a private party applying for public services or benefits is acting voluntarily in subjecting itself to the

authority of government. Yet, this Court's cases apply constitutional standards to state or local government administration of access to public services or benefits programs. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975)(applying due process to student discipline in public school); *Goldberg v. Kelly*, 397 U.S. 254 (1970)(applying due process to deprivation of welfare benefits).

And constitutional standards apply to government in its role as employer or private contractor, even though there is no compulsion for any person to enter into an employment relationship or a contractual relationship with government. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)(applying due process to local public school employee); *Branti v. Finkel*, 445 U.S. 507 (1980)(restricting political patronage dismissals in a public defender office); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996)(extending first amendment protection to trash hauler serving as independent contractor to government); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996)(applying patronage cases to independent contractors).

In sum, the purported voluntariness of petitioner's membership in TSSAA and the ostensibly contractual relationship between petitioner and TSSAA do not immunize from constitutional scrutiny conduct that is fairly attributable to the government. The first prong of *Lugar* is satisfied if an alleged constitutional deprivation is "caused by the exercise of some right or privilege created by the State" or "by a person for whom the State is responsible." 457 U.S. at 937.

In this case, TSSAA is largely composed of and effectively controlled by public schools and public school officials acting in their official capacity "for whom the State is responsible." Further, local public school officials have delegated regulatory authority to TSSAA to allocate a scarce public resource – controlling access to playing

interscholastic athletics with all the public schools in the state by determining what schools the public schools of Tennessee may compete against in interscholastic athletics and under what groundrules. Within the first prong of *Lugar*, that is the "exercise of a right or privilege created by the State" – *i.e.*, created by the conduct of every public school in the state that fields an interscholastic athletic team.

B. The Regulatory Conduct of TSSAA Is Controlled By Local Public Schools and Public School Officials Acting Ex Officio and As Such Is a "Rule of Conduct Imposed by the State" Under *Lugar*

Action by local public entities such as public schools and by local public officials such as public school principals is state action. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975)(applying due process to student discipline in public school). The existence or non-existence of state legislation authorizing TSSAA to serve as the agency responsible for regulating interscholastic athletics is not determinative of the state action issue. A "rule of conduct imposed by the State" under *Lugar* can be imposed by local government actors as well as by the legislature itself.

Thus, respondents' contention – itself subject to challenge – that "[t]here is no evidence that the state of Tennessee has ever regulated interscholastic athletic competition" is simply not by itself a reason for holding that TSSAA does not act under color of law. Brief of Respondents at 17. Clearly, interscholastic athletics in Tennessee are regulated by TSSAA. If, as petitioner contends and *Tarkanian* states, the regulatory conduct of TSSAA is fairly attributable to the parties that control it, then TSSAA acts under color of state law and TSSAA's "rule[s]

of conduct" are "imposed by the State" within the meaning of *Lugar*.

C. SBE's 24-Year Designation of TSSAA to Regulate Interscholastic Athletics and the Ongoing Effect of SBE's Continued Recognition of TSSAA's Regulatory Role Mean that TSSAA's Regulatory Conduct Constitutes "the Exercise of Some Right or Privilege Created by the State" Under *Lugar*

In addition to the local-level government conduct that characterizes TSSAA's regulatory activity, there is also state-level government conduct as well. Respondents assert that "[t]he State of Tennessee has never regulated interscholastic athletic competition." Brief of Respondents at 16. Of course, respondents acknowledge, as they must, that for 24 years the SBE designated TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." CP 23-B. As the district court found, and despite TSSAA's "bold statements to the contrary" (which are repeated in this Court),[8] the SBE has "reviewed and approved rules and regulations of the TSSAA since at least 1972." CP 24-B. Since 1996, SBE has no longer "'designate[d]' TSSAA as the official organization for supervision and regulation of secondary school athletics."

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[8] Respondents assert that "TSSAA never sought State Board of Education approval of its rules or by-laws." Brief of Respondents at 16. TSSAA apparently taxed the patience of the district court on this point: "It is disingenuous, at best, for Defendants to repeatedly state in their briefs ... that the State has never reviewed or approved TSSAA rules. Such an assertion is utterly false, as demonstrated by the minutes of the State Board of Education." CP 26-B; *see also* JA-157-69.

Now it "recognizes... the role of [TSSAA] in coordinating interscholastic athletic competition." CP 26-B. Still, SBE "clearly singles out the TSSAA by name to serve this function," and, "[m]ore importantly, the conduct of the parties has not materially changed." *Id.*

When viewed from the local-level perspective, TSSAA's regulatory conduct satisfies the *Lugar* state action requirement because local public schools and their officials control the organization's regulatory function and because the organization sets the groundrules for any school that wishes to compete in interscholastic athletics against any public school in Tennessee that fields an interscholastic athletics team. All public schools have joined TSSAA, and TSSAA serves as gatekeeper for any non-public school seeking to play interscholastic athletics with any public school. TSSAA is the regulator, not the regulatee,[9] serving as agent for local public schools, and performing a regulatory function on their behalf. From this local-level perspective, TSSAA's regulatory conduct is a "rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937.

From the state-level perspective, moreover, TSSAA exercises a "right or privilege created by the State." *Id.* The SBE has conferred authority on TSSAA to regulate interscholastic athletics for the state's public high schools. No change in function or relationships has taken place since

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[9] This distinguishes cases in which the issue was whether different degrees of state regulation or oversight were sufficient to turn the conduct of a private regulatee into state action. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). TSSAA exercises regulatory authority on behalf of the government (local-level and state-level). Its state action status stems from that function and its relationships with government at the local and state levels. Its state action status does not depend on its role as a regulatee.

SBE switched from designating TSSAA to recognizing TSSAA's regulatory role. *Cf.* note 3, *supra*. As a result of SBE's action, TSSAA controls access to interscholastic athletic competition with all public schools in Tennessee that field interscholastic athletic teams. SBE's 24-year designation of TSSAA to perform this regulatory function for all the state's public high schools has an ongoing effect. As a consequence, TSSAA's regulatory authority and conduct reflect the exercise of a "right or privilege created by the State."

D. SBE's Designation of TSSAA to Regulate Interscholastic Athletics As Its Agent Constitutes a "Right or Privilege Created By the State" Under *Lugar* Whether Or Not SBE Acted With Legislative Authorization

Respondents continue to contend that SBE's designation of TSSAA to serve as SBE's agent for the regulation of interscholastic athletics was without legislative authorization. Brief of Respondents at 16. This position is without foundation, see Brief of United States at 3-4, 20-21. But even if respondents were correct about Tennessee law in this regard, that would not alter the analysis.

Section 1983 applies to conduct "under color of any ... custom, or usage" as well as to conduct "under color of any statute, ordinance, [or] regulation ... of any State." Well-settled practices of state officials constitute a "custom or usage" with the force of law under §1983, even if "not authorized by written law." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970). "[A]uthority ... for this truism," *id.* at 168, was found in a 1940 Tennessee case, *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362 (1940). In *Browning*, "the 'law' in Tennessee as established

by longstanding practice of state officials was that railroads and public utilities were taxed at full cash value." 398 U.S. at 168. That a statutory provision provided otherwise was not determinative. 310 U.S. at 369.[10]

In the present context, it is indisputably true that SBE formally delegated to TSSAA its authority to regulate interscholastic athletics for Tennessee's public schools. CP 23-B. As a functional matter, the ongoing effect of that delegation persists. For purposes of §1983, that constitutes a "custom or usage" under state law and means that TSSAA's regulatory conduct constitutes the "exercise of some right or privilege created by the State" under the first prong of *Lugar*.

III. Under *Tarkanian*, TSSAA's Regulatory Conduct Is Fairly Attributed to the State Because TSSAA Is Controlled By Public Schools and Public School Officials

The regulatory conduct of TSSAA is controlled by state actors – public schools and public school officials. Under *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988), that control by state actors of a regulatory function is attributable to the state.

In *Tarkanian*, the "source of the legislation adopted by the NCAA" was critical in determining the state-action status of NCAA. Because of NCAA's national character, NCAA's "source" of authority was "not Nevada but the

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[10] As Justice Frankfurter noted, "[i]t would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled practice ... can establish what is state law.... Deeply embedded traditional ways of carrying out state policy ... are often tougher and truer law than the dead words of the written text." 310 U.S. at 369.

collective membership," and that membership spoke "through an organization that is independent of any particular state." *Id.*

The nature of NCAA's "collective membership" was critical because that "collective membership" was the "source" of NCAA's authority. While public institutions in Nevada "had some impact on the NCAA's policy determinations," the "vast majority" of NCAA's members, which "each similarly affected" NCAA's policies, were "located in States other than Nevada" and "did not act under color of Nevada law." *Id.* That is, those non-Nevada institutions controlled the NCAA's decisionmaking. The NCAA's state-action status was therefore determined by the composition and characteristics of the membership that controlled its decisionmaking processes. Since control of NCAA was by institutions from outside of Nevada, the "source" of NCAA's authority was not Nevada, and NCAA's conduct was not fairly attributable to Nevada.

Footnote 13, which has been discussed so much, made this point inexorably clear. "The situation would, of course, be different," this Court noted, "if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* at n.13. The key was control. For state-action purposes, the nature of a regulatory organization depends on the nature of the institutions that control it. If the membership of a regulatory body consists of "public institutions created by the same sovereign" and are all "located within the same State," then the control of the organization rests with state actors from within a single state. Under those circumstances, such as that involved in a high school athletic association like TSSAA, the conduct of the regulatory body constitutes state action.

Therefore, *Tarkanian* stands for the proposition that the "source" of the regulatory policies of an organization such as TSSAA is traceable to the "collective membership" that controls the organization. Public schools and their principals comprise 84% of TSSAA's membership and control its decisionmaking. The regulatory conduct of TSSAA is traceable to those public schools that control it and is therefore attributable to the state.

Since, under *Tarkanian*, control is the essential dimension that determines the character of a regulatory institution, how that control is exercised is irrelevant. Whether TSSAA's elected officials are representatives of public or private schools is not the question; TSSAA's state-action status turns on the control of TSSAA's regulatory functions by public schools and their principals. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 399 (1995)(stressing importance of government "control... as a policymaker" in establishing Amtrak's "state"-action status); *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 269 (1991)(effective control by Congress of airport authority raised separation of powers problem); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)(stressing importance of Congressional control over dismissal of Comptroller General and rejecting relevance of likelihood that Congress would actually remove the Comptroller General).

The critical role of control by state actors in determining the state-action status of TSSAA's regulatory conduct also explains why *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* [*USOC*], 483 U.S. 522 (1987), is distinguishable from this case. *USOC* involved the question whether the conduct of USOC in refusing to allow use of the word "Olympic" in association with the Gay Olympic Games was attributable to the federal government.

The federal government chartered USOC and granted USOC the right to prohibit certain commercial and promotional uses of the word "Olympic" and various Olympic symbols. *Id.* at 526. This Court held that USOC's conduct was not attributable to the federal government. "The fact that Congress granted it a corporate charter does not render the USOC a Government agent." *Id.* at 543.

USOC was not a government agent because there was no evidence that the federal government had any involvement with USOC's decision regarding the Gay Olympics matter, and the government did not control USOC. Unlike TSSAA, USOC is a private organization controlled by private parties, not public institutions or government employees. This Court was unwilling to "equate" the government's "power of persuasion," which was present with respect to USOC, "with control," which was not. *Id.* at 545 n.27. In short, *USOC* reinforces the analytical centrality of control by state actors under principles established in *Tarkanian* and applicable to this case.

Conclusion

TSSAA exercises important governmental functions as the agent of both state-level and local-level governmental entities. It allocates access to an important government resource, establishing and administering the groundrules governing interscholastic athletics for all public high schools in Tennessee that participate in interscholastic athletics. Any private school wishing to participate in interscholastic athletics with a public school is subject to the approval of the TSSAA or its Executive Director and to applicable TSSAA rules and policies.

From the state-level perspective, the State Board of Education has designated TSSAA as its agent to regulate

interscholastic athletics throughout the state, and the effect of that designation is ongoing even though SBE now only recognizes TSSAA's role as the regulator of interscholastic athletics. From the local-level perspective, TSSAA is composed of 84% public schools, which control TSSAA's regulatory program. All public schools in Tennessee that field interscholastic athletic teams are members of TSSAA, delegating to that organization the authority to establish and enforce regulations regarding interscholastic athletics.

As all appellate courts that have addressed the issue other than the Sixth Circuit have held, the regulatory conduct of TSSAA constitutes state action and is subject to constitutional constraints. The decision of the court of appeals should be reversed.

Respectfully submitted,

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MAY 22 2000

In the Supreme Court of the United States

BRENTWOOD ACADEMY, PETITIONER

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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27 pp

QUESTION PRESENTED

Whether an athletic association's regulation of interscholastic athletic competition constitutes state action under the Fourteenth Amendment and activity under color of state law for purposes of 42 U.S.C. 1983 (1994 & Supp. III 1997), when the association is controlled by representatives of public schools located in the same State.

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In the Supreme Court of the United States

No. 99-901

BRENTWOOD ACADEMY, PETITIONER

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case is whether an athletic association's regulation of interscholastic athletic competition qualifies as state action under the Fourteenth Amendment and as activity under color of state law for purposes of 42 U.S.C. 1983 (1994 & Supp. III 1997) when the association is controlled by representatives of public schools located in the same State. The United States has participated as amicus curiae in many of this Court's state action cases, see, *e.g.*, *American Mfrs. Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40 (1999); *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Polk County* v. *Dodson*, 454 U.S. 312 (1981), and it has a substantial interest in the state action question presented here.

First, the Attorney General has authority under 42 U.S.C. 2000h-2 to intervene in any action alleging an equal protection violation based on race, color, religion, sex, or national origin. That statute gives the United States the authority to intervene in cases alleging that athletic associations have committed equal protection violations based on race or sex. The Court's decision in this case will affect that enforcement responsibility.

The United States also has authority to bring criminal prosecutions under 18 U.S.C. 242 (1994 & Supp. IV 1998), which makes it a criminal offense to act willfully and under color of state law to deprive a person of rights protected by the Constitution or laws of the United States. Because the Court has interpreted the phrase "under color of" law to have the same meaning under Section 242 as it does under Section 1983, *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 928 n.9 (1982), the decision in this case could affect that responsibility.

Finally, the United States has an interest in ensuring that it can provide certain forms of support to private entities without subjecting them to constitutional constraints. The decision in this case could affect that interest.

STATEMENT

1. The Tennessee Secondary School Athletic Association (respondent) is a non-profit Tennessee corporation that regulates interscholastic athletic competition among public and private high schools in Tennessee. Pet. App. 4B-5B, 31B. Respondent is composed of 290 public schools and 55 private schools. *Id.* at 4B. Public high schools constitute approximately 84% of respondent's voting membership. *Id.* at 4B-5B. Respondent is the only interscholastic athletic association in Tennessee, and every public high school in Tennessee

that has an interscholastic athletic program is a member of respondent. *Id.* at 22B.

Respondent is governed by a Legislative Council and a Board of Control. Pet. App. 5B. The Legislative Council has authority to enact regulations; the Board of Control has authority to enforce them. *Ibid.* The Legislative Council and the Board of Control are both nine-member bodies elected by popular vote from nine electoral districts. *Ibid.* Each member school that is represented by a principal or other school official at the annual election is entitled to one vote. J.A. 89, 92. Only high school principals, assistant principals, and superintendents are eligible to serve on the Legislative Council and the Board of Control. Pet. App. 5B. During the time period at issue here, the Legislative Council and Board of Control were composed exclusively of public school officials. *Ibid.*

Since 1925, the Tennessee State Board of Education (State Board) has recognized respondent's authority to regulate interscholastic competition. Pet. App. 23B. In 1972, the State Board adopted a regulation formally designating respondent as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Ibid.* The State Board also approved respondent's existing regulations and reserved the right to review the appropriateness of any changes in rules. *Id.* at 10B-11B. Between 1972 and 1992, the State Board approved various regulations adopted by respondent, including respondent's present recruiting rule. *Id.* at 11B, 24B-26B.

State Board documents reflect its understanding that it had delegated to respondent the authority to regulate interscholastic athletics on behalf of the State. Pet. App. 24B-26B. The Tennessee Attorney General ex-

pressed that same view. Tenn. Att'y Gen. Op. No. 83-163, 1983 WL 167080, at *1 (Apr. 5, 1983) (stating that respondent's "authority to regulate athletics is derived from the State Board of Education's broad authority to regulate public schools").

In 1995, the State Board revoked the 1972 regulation and adopted a new one in its place. Pet. App. 11B. The new regulation, which took effect in 1996 provides:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Ibid.

Representatives of the State Board and the State Department of Education serve as ex officio members on respondent's Board of Control and Legislative Council. Pet. App. 35B. After the State Board amended its regulation concerning its relationship with respondent, state representatives continued to serve as ex officio members on respondent's governing bodies. *Ibid.* Respondent receives no funding from the State, and its staff is not paid by the State. *Id.* at 8A. Tennessee law nonetheless authorizes respondent's administrative staff, including its Executive Director, to participate in the State's retirement system. *Id.* at 33B. Respondent derives a substantial portion of its revenue from gate receipts from athletic contests played at state-owned facilities. *Id.* at 32B. Respondent pays the State for the use of those facilities. *Id.* at 9A.

2. Petitioner Brentwood Academy is a private school and a member of respondent. Pet. App. 4B. In 1997, certain public high school coaches accused petitioner of violating respondent's recruiting rule. *Id.* at 11B-12B. That rule prohibits members from using "undue influence" to "secure or to retain a student for athletic purposes." *Id.* at 6B. After an investigation, respondent's Executive Director concluded that petitioner had violated respondent's recruiting rule by providing free game tickets to a coach at a public middle school and by inviting incoming students to a spring football practice. *Id.* at 14B-15B. The Executive Director also found that petitioner had violated another one of respondent's regulations. *Id.* at 15B. The Executive Director declared petitioner ineligible to participate in football and basketball tournaments for one year and placed petitioner on probation for two years. *Ibid.*

Respondent's Board of Control affirmed the Executive Director's determination that petitioner had violated the recruiting rule. Pet. App. 16B. The Board of Control increased the sanctions for the violations, banning petitioner from tournaments for two years, placing petitioner on probation for four years, and fining petitioner $3000. *Id.* at 17B. All nine of the voting Board of Control members who participated in petitioner's administrative appeal were principals of public high schools. *Id.* at 16B.

In December 1997, petitioner filed suit against respondent and its Executive Director under 42 U.S.C. 1983 (1994 & Supp. III 1997), alleging that respondent's recruiting rule violated, *inter alia*, the First Amendment to the Constitution as applied to the States through the Fourteenth Amendment. Pet. App. 3B-4B, 18B. The district court granted petitioner's motion for

summary judgment, holding that respondent's recruiting rule violated the First Amendment. *Id.* at 1B-62B.

The district court first held that respondent's adoption and enforcement of the recruiting rule constituted state action. Pet. App. 20B-37B. In reaching that conclusion, the court relied in part on the State Board's 1972 regulation designating respondent as the entity responsible for interscholastic athletics in Tennessee. *Id.* at 23B-27B. The court rejected respondent's argument that the 1995 regulation eliminated the basis for a finding of state action. The district court reasoned that the new regulation still singles out respondent by name as the organization responsible for the regulation of high school athletics and does not materially change the relationship between the State and respondent. *Id.* at 26B-27B.

The district court also relied on the composition of respondent's membership and leadership as a basis for its state action holding. Pet. App. 27B-28B. The court noted that "the overwhelming majority" of respondent's members are public schools, and that in 1997, "all members of the Board of Control and Legislative Council were principals of public schools." *Ibid.* The court concluded that those facts are independently sufficient to show that respondent is a state actor. *Id.* at 29B. In reaching that conclusion, the court relied on the statement in *National Collegiate Athletic Ass'n (NCAA)* v. *Tarkanian*, 488 U.S. 179, 194 n.13 (1988), that while the NCAA is not a state actor, "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." Pet. App. 29B.

The district court next held that respondent's recruiting rule violated the First Amendment on its face

and as applied to petitioner. Pet. App. 40B-58B. The court enjoined respondent from enforcing that rule. *Id.* at 61B.

3. The court of appeals reversed, Pet. App. 1A-18A, holding that respondent is not a state actor. The court first concluded that respondent is not an "arm of the government" because no Tennessee law or State Board regulation currently in effect delegates to respondent the authority to conduct interscholastic athletics on behalf of the State. *Id.* at 9A.

The court of appeals next concluded that respondent's actions are not "fairly attributable" to the State. Pet. App. 11A-18A. The court held that respondent's actions are not fairly attributable to the State under the "public function test" because the regulation of interscholastic sports is not a power "traditionally exclusively reserved to the state." *Id.* at 11A. It held that respondent's actions are not fairly attributable to the State under the "state compulsion test" because, in its view, the State had not "coerced or encouraged" the challenged conduct. *Id.* at 12A-13A. And, for essentially the same reasons, the court held that respondent's actions are not fairly attributable to the State under the "symbiotic relationship test." *Id.* at 13A-14A.

The court of appeals also rejected the district court's reliance on *Tarkanian*. Pet. App. 16A-17A. The court concluded that, under *Tarkanian*, even if respondent is a state actor when dealing with a public school, it is not a state actor in its relationship with private schools such as petitioner. *Id.* at 17A.

The court denied a petition for rehearing en banc. Pet. App. 1C-2C. Judge Merritt, joined by Judge Clay, dissented from the denial of rehearing en banc. *Id.* at 2C-6C. Judge Merritt stated that the panel's decision "appears to be inconsistent" with language from

Tarkanian. *Id.* at 4C. Judge Merritt also criticized the panel for ignoring the "cooperative relationship between [respondent] and the state's public high schools [and] the coercive power of [respondent]." *Id.* at 5C.

SUMMARY OF ARGUMENT

A. Public schools engage in state action within the meaning of the Fourteenth Amendment. Thus, if a public school were to adopt a rule governing participation in interscholastic athletic competition, that rule would be subject to challenge under the Fourteenth Amendment.

B. The result should not be different when such a rule is imposed by an athletic association that is controlled by its public school members. Like the actions of a public school, the actions of an athletic association controlled by public schools are fairly attributable to the State.

This Court's decisions support that conclusion. In several cases, the Court has held that nominally private entities that are publicly controlled and that serve government objectives are engaged in state action. The Court has applied that principle to a college created by a private will, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per curiam), a privately owned park, *Evans* v. *Newton*, 382 U.S. 296 (1966), and a corporation that operates passenger trains, *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). Because each of those entities was publicly controlled and served a public purpose, the entity's actions constituted state action.

C. Under those decisions, an athletic association that is composed primarily of public schools is engaged in state action. When public schools constitute a voting majority of the members of an athletic association, they

have effective control over the actions of the association. And, since interscholastic athletic competition is a component of the education program offered by public schools, an athletic association's regulation of that activity furthers government objectives.

With the exception of the court below, the courts of appeals have uniformly held that athletic associations are state actors when they are composed primarily of public schools. In *NCAA* v. *Tarkanian*, 488 U.S. 179 (1988), the Court made clear that those decisions correctly implement state action principles.

A contrary view would permit a publicly controlled athletic association to engage in practices that blatantly discriminate on the basis of race or sex without exposing those practices to constitutional challenge. For example, such an athletic association could preclude private schools from joining the association based on the race of their students. Such an association could also deny girls the opportunity to participate in a wide range of interscholastic sports.

D. Under the correct state action analysis, respondent is engaged in state action. Public schools constitute approximately 84% of respondent's voting members, and during the relevant period, respondent's governing bodies were composed exclusively of public school officials. Respondent is therefore publicly controlled. Respondent's regulation of interscholastic athletic competition also serves state educational purposes. The Tennessee State Board of Education has adopted a regulation that expressly recognizes the importance of interscholastic athletic competition to public education and respondent's role in regulating such competition. Because respondent is controlled by public schools and serves government objectives, its regulation of interscholastic athletic competition constitutes state action.

ARGUMENT

RESPONDENT IS ENGAGED IN STATE ACTION BECAUSE IT IS CONTROLLED BY ITS PUBLIC SCHOOL MEMBERS AND IT SERVES STATE EDUCATIONAL OBJECTIVES

A. Public Schools And Their Officials Are State Actors

The Fourteenth Amendment to the Constitution, "by its very terms, prohibits only state action." *United States* v. *Morrison*, No. 99-5 (May 15, 2000), slip op. 21. It "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 & n.12 (1948). Similarly, 42 U.S.C. 1983 (1994 & Supp. III 1997) authorizes a cause of action to enforce constitutional guarantees only against persons who act "under color of" state law. Those limitations are identical "[w]here, as here, deprivations of rights under the Fourteenth Amendment are alleged." *American Mfrs. Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 n.8 (1999).

In general, conduct constitutes state action and action under color of law if (1) the alleged constitutional deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *American Mfrs.*, 526 U.S. at 50. The core inquiry is whether the alleged infringement of federal rights is "fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Application of that standard is straightforward when a suit is brought challenging the actions of a local government entity, such as a public school system, or a public official acting in an official capacity, such as a

principal. "The actions of local government *are* the actions of the State." *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968). Similarly, except in unusual circumstances, a public employee engages in state action "while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West* v. *Atkins*, 487 U.S. 42, 50 (1988); see *ibid* (noting that a public defender is the only public official acting in an official capacity the Court has found not to be engaged in state action). Thus, under established state action principles, if a public school or its principal were to adopt a rule governing participation in interscholastic athletic competition, that rule would be subject to challenge under the Fourteenth Amendment. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 334-337 (1985) (public schools and public school officials are state actors for purposes of the Fourteenth Amendment).

B. Government Controlled Entities That Serve Government Objectives Are State Actors

The outcome should not be different when such a rule is adopted by an athletic association that is controlled by its public school members. When public entities control a nominally private entity that serves a public purpose, the actions of the nominally private entity are "fairly attributable to the State." *Lugar*, 457 U.S. at 937.

Several decisions of this Court support that conclusion. For example, in *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per curiam), Girard College had been built and maintained pursuant to a private trust that limited admission to the college to white students. Pursuant to the terms of the trust, the college was operated and controlled by a board of state appointees, which was itself a state agency. *Id.* at

231. The Court held that, because the college was controlled by an agency of the State, the college's refusal to admit black students "was discrimination by the State * * * forbidden by the Fourteenth Amendment." *Ibid.*

Similarly, in *Evans* v. *Newton*, 382 U.S. 296 (1966), a person devised a tract of land to the City of Macon, Georgia, to be used as a municipal park for use by whites only. When the City determined that it could no longer constitutionally operate the park on a segregated basis, private trustees were appointed and title to the park was vested in them. *Id.* at 298. The Court held that the change in trustees did not automatically eliminate Fourteenth Amendment constraints. *Id.* at 301-302. The Court explained that the park served the public purpose of providing recreational opportunities to the community, *ibid.*, and that "[i]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment," *id.* at 301.

Finally, in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Court held that an operator of passenger trains commonly known as Amtrak is a government actor for constitutional purposes, despite Congress's designation of it as a private corporation. The Court emphasized that Amtrak "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees." *Id.* at 398. The Court added that "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the cor-

poration is part of the Government for purposes of the First Amendment." *Id.* at 400.

While *Lebron* involved a nominally private entity that was governmentally created, furthered a government objective, and was governmentally controlled, the Court did not suggest that all three features are necessary prerequisites to a finding of state action. To the contrary, the Court expressly reaffirmed the holding in *City Trusts* that Girard College was a state actor, even though it was created pursuant to a private trust, rather than a special law. 513 U.S. at 397. The fact that Amtrak "was created by a special statute" simply made it "an *a fortiori* case." *Ibid.*

Thus, the entities involved in *City Trusts*, *Evans*, and *Lebron* shared two important characteristics. First, each of the entities was subject to government control. Second, the services provided by each of the entities furthered government objectives.[1] *City Trusts*, *Evans*, and *Lebron* therefore support the following state action principle: A publicly-controlled entity that furthers government objectives is engaged in state action.

C. Athletic Associations That Are Composed Primarily Of Public Schools In A Single State Are State Actors

1. Applying that principle, an athletic association's regulation of interscholastic athletic competition constitutes state action when public schools constitute a majority of the association's voting members. When

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[1] *Evans* and *Lebron* specifically referred to the public objectives served by the entity. *Evans*, 382 U.S. at 301-302 (park serves a public purpose); *Lebron*, 513 U.S. 397-398 (passenger rail service furthers government objectives). While *City Trusts* did not specifically mention that factor, it was present in that case as well. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982) (education serves a public function).

public schools constitute a voting majority, they have effective control over elections for the association's governing body. In such circumstances, the association is fairly viewed as publicly-controlled. See *Lebron*, (entity is government controlled when the government appoints a majority of the members of the governing body); cf. *Thornburg* v. *Gingles*, 478 U.S. 30, 50 & n.17 (1986) (group that is in the majority has potential to elect candidates of its choice). Moreover, since interscholastic athletic competition is a component of the education program offered by public schools, an athletic association's regulation of that activity furthers government objectives. Because athletic associations composed primarily of public schools are publicly controlled and serve government objectives, they are state actors for constitutional purposes.

2. The courts of appeals have long taken that view. With the exception of the court below, the courts of appeals have uniformly held that athletic associations composed primarily of public schools are state actors.[2]

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[2] See *Griffin High School* v. *Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) ("Public schools make up 85% of the [association's] membership," and "the overwhelmingly public character of the [association's] membership is sufficient to confer state action."); *United States ex rel. Mo. State High Sch. Activities Ass'n* v. *Missouri State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) ("Because MSHSAA is an association comprised primarily of public schools, its rules are state action."); *Louisiana High Sch. Athletic Ass'n* v. *St. Augustine High Sch.*, 396 F.2d 224, 227 (5th Cir. 1968) (emphasizing that 85% of members are public schools); see *Crane* v. *Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting) (association is "composed primarily of public schools—so its actions, I agree, are state action"); see also *Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (concluding that actions of an athletic association are state action because "member public schools

The courts of appeals have also held in other contexts that entities are state actors when their governing bodies consist primarily of state officials or persons appointed by state officials.[3] In contrast, the courts have refused to find state action when government appointees and public officials constitute less than a majority on an entity's governing body and government control is not otherwise established.[4] That approach correctly implements the state action requirement.

3. *NCAA* v. *Tarkanian*, 488 U.S. 179 (1988), provides further support for the conclusion that an athletic association is a state actor when public schools constitute a majority of its voting members. In *Tarkanian*,

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play a substantial role in determining and enforcing the policies and regulations of the [association]"), cert. denied, 464 U.S. 818 (1983).

[3] *McVarish* v. *Mid-Nebraska Community Mental Health Ctr.*, 696 F.2d 69, 71 (8th Cir. 1982) (mental health center); *Foster* v. *Ripley*, 645 F.2d 1142, 1147 (D.C. Cir. 1981) (scientific research organization); *Jackson* v. *Statler Found.*, 496 F.2d 623 (2d Cir. 1973) (foundation); *Chiaffitelli* v. *Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (hospital).

[4] *American Bankers Mortgage Corp.* v. *Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1407-1409 (9th Cir.) (Freddie Mac is not a government actor since government is entitled to appoint fewer than one-third of Freddie Mac's directors), cert. denied, 519 U.S. 812 (1996); *Hall* v. *American Nat'l Red Cross*, 86 F.3d 919, 921-922 (9th Cir.) (Red Cross is not a government actor since President appoints only 8 of the 50 members of its Board of Governors), cert. denied, 519 U.S. 1010 (1996); *Becker* v. *Gallaudet Univ.*, 66 F. Supp. 2d 16, 20-21 (D.D.C. 1999) (Gallaudet University is not a government actor since only three of the 21 members of its governing body are public officials); *Hack* v. *President & Fellows of Yale College*, 16 F. Supp. 2d 183, 188-189 (D. Conn. 1998) (Yale College is not a government actor since Governor and Lieutenant Governor are the only two government officials on the 19-member governing body).

the Court held that the NCAA did not engage in state action when it pressured the University of Nevada at Las Vegas to suspend its head basketball coach. The Court reasoned that, because the NCAA is composed primarily of universities from States other than Nevada, NCAA's conduct could not be viewed as action under color of Nevada law. *Id.* at 191.

The Court observed, however, that "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Tarkanian*, 488 U.S. at 193 n.13. The Court then cited with approval two court of appeals decisions that had held that athletic associations composed primarily of public schools located within the same State are state actors for purposes of the Constitution. *Ibid* (citing *Clark*, *supra*, and *Louisiana High Sch. Athletic Ass'n*, *supra*). *Tarkanian* therefore supports the state action theory we have articulated here.

The court of appeals in this case drew a different conclusion. In its view (Pet. App. 17A), *Tarkanian* suggests that a single-State athletic association may be engaged in state action when it regulates a public school, but not when it regulates a private school. That reading of *Tarkanian* is mistaken. One of the cases cited by *Tarkanian* with approval (488 U.S. at 193 n.13) held that a high school athletic association engaged in state action when it denied membership to a private school. See *Louisiana High Sch. Athletic Ass'n*, 396 F.2d at 225-226. More fundamentally, *Tarkanian* makes clear that the critical distinction for state action purposes is between a national athletic association composed primarily of private schools from many States and an athletic association composed primarily of public

schools in a single State. 488 U.S. at 193 & n.13. The former is not a state actor, but the latter is. *Ibid.* The dissent in *Tarkanian* drew a distinction between an athletic association's regulation of public schools and its regulation of private schools. *Id.* at 202 & n.2 (White, J., dissenting). The Court, however, rejected the dissent's theory. *Id.* at 193 & n.13, 197 n.17. *Tarkanian* therefore supports the conclusion that an athletic association is a state actor when a majority of its voting members are public schools in a single State.[5]

4. Treating athletic associations as state actors when public schools constitute a voting majority also accords with the purposes of the state action requirement. Those purposes are to "preserve[] an area of individual freedom," and to "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. When public schools constitute a voting majority of an athletic association and control the elections for the association's governing body, subjecting the association's decisions to constitutional scrutiny does not intrude into an area of individual freedom. At the same time, since public entities have effective control over the association's decisions, it is not unfair to hold the State responsible for them.

5. Failing to subject the decisions of such an association to constitutional scrutiny could also have far-reaching consequences. It would mean that an athletic association that is controlled by public schools could pre-

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[5] Because the NCAA is composed primarily of *private* schools, *Tarkanian* did not address the question whether a national (or regional) athletic association would be engaged in state action if *public* colleges and universities from different States constituted a majority of its members. Nor is that issue presented in this case.

clude a private school from joining the association based on the race of its students, and the actions of the association would not be subject to challenge under the Constitution. It would also mean that such an athletic association could deny high school girls the opportunity to participate in a wide range of interscholastic sports without subjecting that practice to constitutional challenge.

In the past, athletic associations have been guilty of such discriminatory practices. See, *e.g.*, *Louisiana High Sch. Athletic Ass'n*, *supra* (denying admission to school composed of black students); *Brenden* v. *Independent Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (precluding girls from participating in certain sports); *Hoover* v. *Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (same); *Carnes* v. *Tennessee Secondary Schs. Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976) (same); *Gilpin* v. *Kansas State High Sch. Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1974) (same). Allegations that high school athletic associations discriminate against female athletes persist today. *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729 (W.D. Mich. 2000).

A party may always sue a public school when it enforces an athletic association's discriminatory rule. See *Tarkanian*, 488 U.S. at 192-193. Not all rules imposed by an athletic association, however, are enforced by individual public schools. For example, when a private school is denied membership in an athletic association on the basis of the race or gender of its students, there is no enforcement of the rule by an individual public school. Thus, unless the athletic association itself may be sued, there would be no way to prevent the enforcement of such discrimination.

Even when an individual public school enforces a discriminatory rule, moreover, a suit against the school may not be as efficacious in remedying the discrimination as a suit against the athletic association itself. For example, a public school may be sued for enforcing a rule that unconstitutionally precludes a girl at its school from participating in a particular interscholastic sport. And, in such a case, the court may order the schools to give girls at the school the same opportunity to play on its interscholastic team as it gives to boys. But if the athletic association decides to enforce its discriminatory rule against the school and refuses to permit a team with girls on it to play, the court's remedy could leave the victims of discrimination without an effective remedy and deprive innocent third parties of interscholastic athletic opportunities as well. Those harsh consequences can be avoided if the acts of a publicly controlled athletic association may be challenged directly.[6]

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[6] Regardless of whether it engages in state action, an athletic association that receives federal financial assistance would be prohibited from discriminating on the basis of race and sex by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459 (1999). We have argued that an athletic association is also covered by Title VI and Title IX when a school that receives federal assistance cedes controlling authority over its athletic program to the athletic association. *Id.* at 469. In *Smith*, the Court declined to resolve that issue. *Id.* at 470. The question whether an athletic association is covered by Title VI and Title IX when a recipient cedes to it controlling authority is distinct from the question presented here—whether the actions of an athletic association constitute state action when the association is controlled by representatives of public schools located in the same State.

D. Respondent's Regulation Of Interscholastic Athletic Competition Constitutes State Action

1. Under the principles discussed above, respondent's regulation of interscholastic athletic competition constitutes state action. Respondent is governed by a Legislative Council, which has authority to promulgate rules, and a Board of Control, which is responsible for enforcing the rules. Pet. App. 5B. Since approximately 84% of respondent's members are public schools, *id.* at 4B-5B, and each school is entitled to one vote in elections for respondent's Legislative Council and Board of Control, J.A. 89, 92, public schools have the power to control the elections for those governing bodies.

The membership of the Legislative Council and Board of Control is evidence of that power. At the time that sanctions were imposed against petitioner, the Legislative Council and Board of Control were composed exclusively of public school officials. Pet. App. 5B. In those circumstances, public schools and their officials effectively control respondent's regulation of interscholastic competition.

Respondent's regulation of interscholastic athletic competition also furthers government objectives. Tennessee has recognized, in a variety of ways, that interscholastic athletic competition is an integral part of public education. For example, as a component of its power to regulate the public school curriculum, the State Board has broad authority over interscholastic athletics. Tenn. Att'y Gen. Op. No. 83-163, 1983 WL 167080, at *2 (Apr. 5, 1983). The State Board allows interscholastic athletics to be substituted for the physical education graduation requirement, thus enabling

students to earn academic credit for participating in activities sponsored by respondent. Pet. App. 34B.

Between 1972 and 1996, the State Board formally delegated to respondent its authority to regulate interscholastic athletics for the State's public schools. Pet. App. 23B. The State treated respondent as its agent for that purpose, closely monitoring respondent's activities and repeatedly approving the association's regulations, including the recruiting rule challenged by petitioner. *Id.* at 11B, 24B-26B. In 1995, the State Board adopted a regulation "recogniz[ing] the value of participation in interscholastic athletics and the role of [respondent] in coordinating interscholastic athletic competition." *Id.* at 11B. That regulation also expressly authorizes public schools to join respondent, *ibid.*, which is the only interscholastic athletic association for public schools in Tennessee, *id* at 28B, 31B. Representatives of both the State Board of Education and the State Department of Education continue to serve as ex officio members of respondent's Board of Control and Legislative Council, *id.* at 35B, and the State allows respondent's employees to participate in the State's retirement system, *id.* at 33B.

Those circumstances show that public schools and their officials control respondent's actions and that those actions further the State's educational objectives. Respondent is therefore engaged in state action for purposes of the Fourteenth Amendment.

2. In reaching a contrary conclusion, the court of appeals relied primarily on this Court's decisions in *Blum* v. *Yaretsky*, 457 U.S. 991 (1982) (private nursing home not engaged in state action), *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982) (private school not engaged in state action, and *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522,

545 (1987) (United States Olympic Committee not engaged in state action). In those cases, however, the entities involved were controlled by private parties, and the question was whether certain forms of government action, such as extensive regulation, *Blum*, 457 U.S. at 1004, government funding, *Rendell-Baker*, 457 U.S. at 840-841, or the granting of a right to exclusive use of a word, *San Francisco Arts*, 483 U.S. at 544, transformed the private entities into state actors.

The situation here is entirely different. Here, respondent is composed primarily of public schools and those schools have effective control over respondent's governing bodies. Respondent's regulation of interscholastic competition therefore constitutes state action, and nothing in *Blum*, *Rendell-Baker*, or *San Fransciso Arts* suggests otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION AND RONNIE CARTER,
Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* MEMPHIS UNIVERSITY SCHOOL, ST. AGNES ACADEMY, CHRISTIAN BROTHERS HIGH SCHOOL, HUTCHISON SCHOOL, HARDING ACADEMY, LAUSANNE COLLEGIATE SCHOOL, ST. MARY'S EPISCOPAL SCHOOL, BRIARCREST CHRISTIAN SCHOOL, EVANGELICAL CHRISTIAN SCHOOL, AND FIRST ASSEMBLY CHRISTIAN SCHOOL IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2, Memphis University School, St. Agnes Academy, Christian Brothers High School, Hutchison School, Harding Academy, Lausanne Collegiate School, St. Mary's Episcopal School, Briarcrest Christian School, Evangelical Christian School, and First Assembly Christian School make this motion to the Court for leave to file the attached *amici curiae* brief in support of petitioner, Brentwood Academy.[1] This case addresses whether the conduct of the Tennessee Secondary Schools Athletic Association ("TSSAA") is state action under 42 U.S.C.§ 1983 and the Constitution of the United States. The parties joining in as *amici curiae* are a number of independent schools located in the State of Tennessee who are members of the TSSAA, and who are affected by the Sixth Circuit's holding that the conduct of the TSSAA is not state action. *Amici curiae* are well-qualified to inform the Court of the importance of this case to a vital part of each school's curriculum.

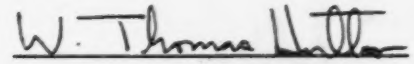
This is a case of national significance, which has the potential to affect the constitutional rights of educational institutions and students in every state. In addition, the decision of the United States Court of Appeals for the Sixth Circuit in this case conflicts with every other federal circuit and State Supreme Court that has addressed this important constitutional question regarding state action. Further, the Sixth Circuit's decision is in conflict with relevant decisions of this Court.

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[1] Counsel for petitioner consented to the filing of the *amici curiae* brief, but counsel for respondents declined.

Amici curiae submit that they have the perspective to inform the Court about the significance of this case, and that the accompanying brief will aid the Court in its decision regarding Brentwood Academy's Petition for Writ of Certiorari. Accordingly, *amici curiae* request the Court to grant their motion and file the attached *amici curiae* brief.

Respectfully submitted,



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INTEREST OF *AMICI CURIAE*

Amici curiae in this case consist of a number of independent schools located in the State of Tennessee who are members of the Tennessee Secondary Schools Athletic Association ("TSSAA"), and who are affected by the Sixth Circuit's holding that the conduct of the TSSAA is not state action. *Amici curiae* have a strong interest in whether the actions of the TSSAA constitute state action. If this Court does not reverse the Sixth Circuit's holding, then Tennessee's schools and their students will be denied constitutional protection from the actions of the TSSAA, resulting in the TSSAA having the power to govern an important part of education – interscholastic athletics – with impunity.

SUMMARY OF THE ARGUMENT[2]

This is a case of national significance, which has the potential to affect the constitutional rights of educational institutions and students in every state. The vast majority of schools across the country emphasize the importance of athletics to education. The Tennessee State Board of Education (the "State Board"), first through custom and practice, then explicitly, then again through custom and practice, delegated the governance of this integral part of education to the TSSAA. The Sixth Circuit's decision that the conduct of the TSSAA is not state action conflicts with every other federal circuit and State Supreme Court that has addressed this important issue, and with the relevant decisions of this Court. Because of the pervasive involvement of public officials with every aspect of the TSSAA's actions, the

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[2] No counsel for any party authored this brief in whole or in part and no person or entity other than amici curiae and their members made a monetary contribution to the preparation or submission of this brief.

conduct of the TSSAA should be deemed to be state action under all of the tests used by this Court to make that determination.

ARGUMENT

REASONS FOR GRANTING CERTIORARI

This is a case of national significance in which the decision of the Sixth Circuit is in conflict with every other federal circuit and State Supreme Court that has addressed this important constitutional question. In addition, the Sixth Circuit's decision is in conflict with relevant decisions of this Court. Thus, this case satisfies the criteria for certiorari under Rule 10(a) of the Supreme Court of the United States, as discussed more fully below.

A. National Significance and Public Policy

1. Effects of the Sixth Circuit's Decision

This case has the potential to affect the constitutional rights of educational institutions and students in every state, making it a case of national significance. The most directly affected state is, of course, Tennessee. If this Court allows the Sixth Circuit's decision to stand, then the TSSAA's actions cannot be challenged under 42 U.S.C. § 1983, and the TSSAA member schools and their students will have no redress for conduct that would otherwise violate their constitutional rights. Without the ability to bring a constitutional challenge, the TSSAA member schools and their students are left with little or no recourse against the TSSAA.

Prior to the Sixth Circuit's decision, Tennessee's schools and students were afforded constitutional protection with respect to the regulation of interscholastic athletics. The Sixth Circuit's decision now allows the TSSAA to govern this important aspect of education in Tennessee without accountability. The TSSAA may exercise unfettered authority and control over secondary school athletics in Tennessee, without regard to the constitutional rights of member schools and their students. In effect, the TSSAA is given the authority to implement policy and to control this entire aspect of education in Tennessee. Just as the State of Tennessee is forbidden from exercising such authority and control without constitutional limitations, the TSSAA should also be subject to constitutional restraints.

The Sixth Circuit's decision also opens the door to challenges to the status of athletic associations in other states in the Sixth Circuit, as well as nationwide. Because high school interscholastic athletics in every state in the Sixth Circuit, and almost every state in the nation, are governed by similar associations, the effects of this decision are far-reaching.

2. Importance of Athletics to Education

The importance of athletics to education should not be underestimated. The TSSAA itself recognizes the importance of athletics as an integral part of education in its Constitution, which provides:

> Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate the athletic and scholastic programs. The athletic field and the

> gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

TSSAA Constitution, Art. 1, Section 2; Pet. App. 33-B.

The schools joining as *amici curiae,* as well as schools around the country, also recognize athletics as an essential component of education. In their handbooks, mission statements, and on their web pages, schools emphasize that athletics are an integral part of the education process. Listed below are excerpts from some of those handbooks, mission statements and web pages from schools around the country, including many of the *amici curiae*:

Memphis University School, Memphis, Tennessee

> At Memphis University School, the athletic program serves as a means to support and realize the mission of the school. As an extension of the classroom, athletics allows students to compete, to achieve goals, to become well-rounded young men of strong moral character, consistent with the school's Christian tradition. Athletics provides an opportunity to practice the principles of life, such as subjecting one's self to authority, working together as members of a team, and controlling the emotions that arise in competition. Athletic competition offers an arena for the demonstration of our commitment to excellence and our desire to succeed through individual, team, and program goals.

Memphis University School Coaches' Handbook, p. 1; App. 1-A.

Hutchison School, Memphis, Tennessee

> Hutchison School is dedicated to the parallel development of mind, body, and spirit as it educates young women for success in college and for lives of integrity and responsible citizenship. Hutchison's ultimate goal is to teach students to demand excellence from themselves in all that they endeavor to do. The athletic program is no exception in this regard. Hutchison School resolves to provide quality coaching, appropriate facilities, and well-supervised instruction to ensure an athletic program of the highest caliber for its young women.

Athletics, Hutchison School, *Hutchison School Athletic Philosophy* (visited December 27, 1999) <http://www.hutchisonschool.org/activities/athletics/index.htm>.

St. Agnes Academy, Memphis, Tennessee

> Athletic programs which are based on the teachings of Christ provide the student with opportunities for learning which foster positive attitudes about self and others. Good sportsmanship, honesty, integrity, and fairness characterize the athletic program at [St. Agnes Academy]. The dignity and uniqueness of each student is respected, and character formation will not be sacrificed for a winning season. The philosophy of the athletic program flows directly from the mission and philosophy of the School.

St. Agnes Academy Student Handbook, 1999-2000 School Year, *Athletics*, p.14; App. 1-B.

Lausanne Collegiate School, Memphis, Tennessee

> Lausanne Collegiate School is a coeducational college preparatory school that strives to educate students with a holistic approach that combines academic integrity with athletic perseverance. The holistic approach focuses not only on the mind of the child but the body and spirit in developing the total individual * * * *
>
> At Lausanne, the education of each individual is the primary responsibility and athletics play a vital role in that educational process. Athletics should be viewed as a co-curricular activity rather than extracurricular, where the development of the student is paramount. Athletics participation at Lausanne will promote and facilitate working together for a common purpose. This type of focus will help the student athlete to develop a better understanding of others, which in turn helps with interpersonal relationships * * * *

Lausanne Lynx Athletics Handbook, Introduction; App. 1-C.

Girls' Preparatory School, Chattanooga, Tennessee

> Giving our girls a well-rounded education is our first goal, and we certainly feel sports participation can play a vital tole. It's given me great personal satisfaction to see so many of our teams excel at a high level year after year, and to see individual girls grow into intelligent and confident young women who step up with enthusiasm to almost any challenge.

Comments of Stacy Hill, Athletic Director, Girls' Preparatory School (visited December 21, 1999) <http://www.gps.edu/Athletics/Athletics.htm#mission>.

The Haverford School, Haverford, Pennsylvania

> Athletics are a vital part of the curriculum of The Haverford School. As an extension of the academic classroom and traditional school day, many valuable lessons are learned through athletic participation. The learning objective of the athletic classroom is to foster an environment where young people reach their fullest potential intellectually, emotionally, and physically * * * * Providing a competitive program of interscholastic sports, * * * The Haverford School requires team participation throughout its middle and upper school curricula. Furthermore, the School strongly discourages boys from specializing in one particular sport. Rather, boys are encouraged to vary their athletic experiences in order to enhance diversity in learning. In addition to physical participation, students are also offered opportunities to contribute to teams in administrative capacities.
>
> As an extension of athletic cooperative learning, The Haverford School values the display of exemplary sportsmanship by its participants and spectators alike * * * * The athletic experience at The Haverford School is dedicated to teaching the principles of participation, excellence, discipline, loyalty, self-confidence, enthusiasm, and cooperative learning. All constituencies of The Haverford School community embrace these qualities.

The Haverford School, *Athletics* (visited December 27, 1999) <http:// www.haverford.org/htmfiles/1athletic.html>.

The Fessenden School, West Newton, Massachusetts

> Athletics are an essential part of a boy's Fessenden School experience.
>
> * * *
>
> We think some of the most important lessons to be learned within the athletic environment at all grade levels are the value of teamwork and cooperative group behavior. Team sports help our boys learn to give for the good of all and to work cohesively as a unit. The pride we share in our students' athletic accomplishments shows in both winning records and winning smiles!
>
> Since many of our coaches are also faculty members, the values that are stressed in the classroom are also applied to athletics. Coaches apply the same expectations of sportsmanship, respect for others, and fair play on the playing field that exist in all other areas of the school.

The Fessenden School, *Athletics* (visited December 27, 1999) <http://www.fessenden.org/pages/athleti.html>.

Delbarton School, Morristown, New Jersey

> Sports at Delbarton are an integral part of student and school life. The school holds the traditional belief that much can be learned about cooperation, competition, and character through athletic participation, and it seeks to honor this commitment by sponsoring a variety of sports on all levels. * * * * Most boys participate on one or more interscholastic teams.

Delbarton School, *Athletics* (visited December 27, 1999) <http://www.delbarton.org/athletics/Index.htm>.

Burr and Burton Academy, Manchester, Vermont

> In keeping with Burr and Burton's dedication to a well-rounded education, athletics and physical fitness are an important component of every student's school experience. In addition to physical education classes, students have the opportunity to participate in sixteen interscholastic sports programs.

Burr and Burton Academy, *Athletics at Burr and Burton* (visited December 27, 1999) <http://www.bbsvt.org/Athletics/Athlet.html>.

Boys' Latin School of Maryland, Baltimore, Maryland

> Over 80 percent of Upper School students participate on an interscholastic team.
>
> * * *
>
> Sports are more than contests at Boys' Latin. They give boys a chance to learn fair play. Finishing what you start. Good sportsmanship, no matter the outcome. Giving everyone a chance to play. Encouraging the weak and striving to be as good as the strong, within one's ability.

Boys' Latin School of Maryland, *Athletics* (visited December 27, 1999) <http://www.md.net/bl/frames.htm>.

The Albany Academy, Albany, New York

> The Albany Academy's tradition of athletic excellence is a direct result of our commitment to make respect for physical health and strength an integral part of every boy's educational experience.

> A young person's intellectual and character development is enhanced by the athletic experience. It presents boys with the opportunities to grow by testing their will, strength, skill, endurance, and the ability to function in a team environment. The Academy believes in athleticism as a fundamental building block of personal growth.

The Albany Academy, *Athletics* (visited December 27, 1999) <http://www.albany-academy.org/athletics/athletics.htm>.

Valley Forge Military Academy & College, Wayne, Pennsylvania

> As a means to promote the whole person concept, the Academy offers a wide variety of sports to its cadets. The goal of the Academy is to encourage the physical development and leadership qualities necessary for success in today's competitive world market. Cadets are encouraged to participate in interscholastic events, and many participate in intramural or "club" sports programs such as rugby.

Valley Forge Military Academy & College, Activities, *Athletics Information Page* (visited December 27, 1999) <http://www.vfmac.edu/sports/sports.html>.

These are just a few examples from schools around the country that operate under the premise that athletics constitute an integral part of education.

B. State Action

1. Federal Circuit Courts

As Judge Merritt stated in his dissent from the Order denying Brentwood Academy's petition for rehearing *en banc*, the Sixth Circuit's decision is

> inconsistent with the basic authorities on state action, and with well-established legal theory underlying their holdings . . . . We have created an unnecessary conflict in the circuits on an important question of constitutional law. The conflict will have to be remedied now by the Supreme Court.

Pet. App. 6-C. As discussed in Petitioner's brief, the holding of the Sixth Circuit is inconsistent with the decisions of the Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. *See* Pet. Brief pp. 8-10.

2. State Supreme Courts

The decision of the Sixth Circuit also conflicts with the State Supreme Court decisions that have addressed the issue. *See* Pet. Brief p. 10.

3. Supreme Court of the United States

The Sixth Circuit's decision is in conflict with the decisions of this Court regarding state action, notably *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), which cited approvingly two cases in which high school athletic associations were held to be state actors. In holding that the

NCAA was not a state actor because of the national character of the organization, this Court stated that "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* (citations omitted). The TSSAA fits perfectly within this description – it is an organization in which the membership consists entirely of institutions located within the State of Tennessee, most of which are public schools created by the State. Under *Tarkanian's* footnote 13, as well as other decisions of this Court relating to state action, the TSSAA's actions fall squarely into the realm of state action.

a. Undisputed Facts

The District Court found the following facts to be undisputed:

- The TSSAA is an association of public, independent and parochial secondary schools from across the State of Tennessee, which is comprised of 290 public schools, and 55 independent and parochial schools. Pet. App. 4-B.
- Public high schools compose 84% of the voting membership of the TSSAA, and independent and parochial schools compose 16% of the voting membership of the TSSAA. Pet. App. 5-B.
- The purpose of the TSSAA is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." Pet. App. 5-B.
- By electing to be a member of TSSAA, each member school agrees to abide by the Constitution and By-laws of the TSSAA. Pet. App. 5-B.

- The rules and regulations of the TSSAA are enacted by its Legislative Council, a nine-member body composed of high school principals, assistant principals or qualified superintendents elected by popular vote in each of nine electoral districts. Pet. App. 5-B.
- The administrative authority of the TSSAA is vested in a Board of Control, composed of nine members who are high school principals or superintendents, similarly elected by popular vote. Pet. App. 5-B.
- All of the voting members of the Legislative Council and the Board of Control in 1997 were public high school administrators. None of the voting members of the Legislative Council and the Board of Control in 1997 were principals of independent or parochial schools. Pet. App. 5-B.
- The membership of the TSSAA is primarily public schools, and the governance of the TSSAA is exclusively by public officials. Pet. App. 28-B.
- The TSSAA rules provide that public school principles and coaches submit certain reports to the TSSAA on a regular basis. Principals, who are state-paid, state-supervised, public officials, are responsible to the TSSAA in all matters pertaining to athletic relations of their schools. Pet. App. 32-B.
- A substantial portion of the TSSAA's annual revenue comes from tournament receipts from athletic tournaments of member schools. The majority of athletic contests between member schools are played in public, state-owned facilities. The TSSAA directly dictates the parameters of all post-season play for public schools. Pet. App. 32-B, 33-B.
- Employees of the TSSAA are covered by Tennessee's retirement system, and by statute are included within the definition of "teachers" for that purpose. Pet. App. 33-B.

- For a public school to be a member of the TSSAA, its coach must have a Tennessee teaching license, must be a full-time employee of the State Board and must be paid entirely from funds approved by the State Board or the governing board of the school. Pet. App. 33-B.
- Students get academic credit for TSSAA activities. Pet. App. 34-B.
- Officials for athletic contests at TSSAA schools must be selected from the official TSSAA list and paid TSSAA-set fees. The TSSAA also sets ticket prices for all regional and state tournament games. Pet. App. 31-B, 32-B.
- Since 1925, the State Board has recognized the functions of the TSSAA in providing standards, rules and regulations of interscholastic competition in the public schools in Tennessee. In 1972, by rule, the State Board designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." Pet. App. 10-B.
- In 1972, the State Board approved the current rules and regulations of the TSSAA and reserved the right to review the appropriateness of any future changes. On several occasions in 1972 through 1992, the State Board reviewed and approved the TSSAA rules, including the Recruiting Rule at issue in this case. Pet. App. 10-B, 11-B.
- In a 1992 memorandum to the State Board, the TSSAA executive director stated: "This is somewhat ceremonial, though important as a means of reminding the world that the TSSAA works as an agent on behalf of the State Board of Education." Pet. App. 25-B.
- In a 1993 memorandum, the TSSAA executive director stated: "Competitive athletics is a big part of the high

school experience. The [TSSAA] manages these activities as sanctioned by the State Board of Education. This annual report keeps members informed of issues and changes in TSSAA policies." Pet. App. 25-B, 26-B.

- In 1995, the State Board amended its rule designating the TSSAA to govern athletic activity within Tennessee, and replaced it with a rule that stated that the State Board "recognizes the value of participation in interscholastic athletics and the role of the [TSSAA] in coordinating interscholastic athletic competitions. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the [TSSAA]." Pet. App. 11-B.
- Although the language of the new rule was changed (apparently to avoid litigating a claim of state action) to no longer "designate" the TSSAA as the official organization for supervision and regulation of secondary school athletics, it clearly singled out the TSSAA by name to serve this function. More importantly, the conduct of the parties did not materially change after the rule was instituted. Pet. App. 26-B, 27-B.
- The State of Tennessee, first through custom and practice, then explicitly, then again through custom and practice, has recognized the TSSAA as the official body for the regulation and control of interscholastic athletics. Pet. App. 27-B.
- The TSSAA has the power to keep schools from competing against other schools. Pet. App. 32-B.
- The TSSAA is the only organization governing interscholastic athletics in the State of Tennessee. Pet. App. 28-B.

b. Law

This Court has used a variety of approaches to determine whether a party's conduct constitutes state action. These approaches include: (1) the nexus test of *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); (2) the joint participation/conspiracy/custom or usage analysis of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); (3) the public function inquiry of *Terry v. Adams*, 345 U.S. 461 (1953) and *Marsh v. Alabama*, 326 U.S. 501 (1946); and (4) the symbiotic relationship test of *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

Under all the approaches set forth above, the "ultimate issue" to be determined is whether "the alleged infringement of federal rights" is "fairly attributable to the State." *See Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (citing *Lugar*, 457 U.S. at 937).

i. The Nexus Test

Under the nexus test, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Blum*, 457 U.S. at 1004 (citing *Jackson*, 419 U.S. at 351). In this case, there is a strong nexus between the actions of the TSSAA and the State. On one level, the State Board has turned over all of the regulation of interscholastic athletics to the TSSAA, routinely approved the TSSAA's rules, regulations and actions, and admittedly had the TSSAA act as its "agent." On another level, the vast majority of the TSSAA membership is made up

of public school officials (who are undeniably state actors) and who control, through popular vote, all of the TSSAA's decisions. Thus, all of the decisions, governance and actions of the TSSAA are inextricably intertwined with both the State Board and public officials, all of which are state actors.

ii. The Joint Participation/ Conspiracy/Custom or Usage Test

If a private party acts in joint participation or in a conspiracy with a state actor, or engages in actions that are mandated by the custom or practice of the State, then the private party's actions are considered state action. *See Adickes*, 398 U.S. at 152, 168; *Lugar*, 457 U.S. at 942 (1982). The TSSAA acts jointly with the State because the TSSAA is governed by pubic officials, and "[s]tate employment is generally sufficient to render the defendant a state actor." *See Lugar*, 457 U.S. at 936 n.18. "[T]he involvement of a state official . . . plainly provides the state action essential to show a direct violation of the petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the [state official] were officially authorized, or lawful." *Adickes*, 398 U.S. at 152. Thus, there is direct participation between state actors and the TSSAA sufficient for a finding of state action.

In addition, first through custom and practice, then explicitly, then again through custom and practice, the State Board delegated its authority over athletics to the TSSAA. Pet. App. 27-B. Thus, the TSSAA is also a state actor as a result of the customs and practices of the State of Tennessee.

iii. The Public Function Analysis

The public function analysis requires that a private entity be serving a "public function" in order to find state action. This Court has held that the question is whether the "function" performed has been "traditionally the exclusive prerogative of the State." *Jackson,* 419 U.S. at 353. As the exclusive organization governing interscholastic athletics, the TSSAA has performed a function traditionally reserved to the State: namely, the supervision and regulation of the athletic activities of the public junior and senior high schools in Tennessee.[3]

Since 1925, the State Board has recognized the TSSAA as the governing body for interscholastic competition in the public schools in Tennessee. The TSSAA admitted that it is the only organization governing interscholastic athletic contests within Tennessee. Pet. App. 28-B. As recognized by the United States District Court for the Middle District of Tennessee, the TSSAA is thus performing a public function:

> The TSSAA was organized for the primary purpose of performing a public function. Its stated objective is to "stimulate and regulate the athletic relations of the secondary schools of Tennessee." The vast majority of the schools belonging to the association are public schools

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[3] Tennessee law requires that "[t]here shall be a local public school system operated in each county or combination of counties. There may be a local public school system operated in a municipality or special school district." Tenn. Code Ann. § 49-1-102(c). There is also a provision for a "local board of education" and a "superintendent or director." *Id.*

> constituting a part of the State's secondary school system.

Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485, 491 (M.D. Tenn. 1968).

Because the functions of the TSSAA are functions that have been traditionally and exclusively reserved to the State of Tennessee, the TSSAA should be held to be a state actor under the public function analysis.

iv. The Symbiotic Relationship Test

The symbiotic relationship test, which is closely related to the joint participation analysis, focuses on the links between the State and the private actor, and the benefits each derives from the other. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding that the State had "so far insinuated itself into a position of interdependence with [the private party] that [the State] must be recognized to be a joint participant in the challenged activity").

The District Court found "overwhelming evidence" of a "symbiotic relationship" between the TSSAA and the State of Tennessee. Pet. App. 31-B. As set forth above in the fact section of this brief, there is an undeniable ongoing financial and service relationship between the State and the TSSAA that justifies a finding of state action in this case.

The Sixth Circuit recognized that the type of symbiotic relationship between the State of Tennessee and the TSSAA was sufficient to establish state action in *Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High*

School Athletic Ass'n, 647 F.2d 651, 653 (6th Cir. 1981), where it held that "OSHAA's character as a semi-official in its activities and its symbiotic relationship with the state" established state action. The Sixth Circuit cited the organization of competitions, setting of schedules, arrangement of places to play tournament games, prescription of uniform rules of play, power to sanction schools, requirement that a school must be accredited by the State Board of Education and that membership was a virtual necessity because no other organization provided interscholastic athletic programs as examples of the "symbiotic relationship" between OSHAA and the State. *Id.* Similar indications of a symbiotic relationship exist between the TSSAA and the State of Tennessee.

The conduct of the TSSAA is state action under any of the tests set forth above.

CONCLUSION

For the foregoing reasons, *amici curiae* request that Petitioner's Writ of Certiorari should be granted.

Respectfully submitted,

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December 28, 1999

MEMPHIS UNIVERSITY SCHOOL COACHES' HANDBOOK

PHILOSOPHY

At Memphis University School, the athletic program serves as a means to support and realize the mission of the school. As an extension of the classroom, athletics allows students to compete, to achieve goals, to become well-rounded young men of strong moral character, consistent with the school's Christian tradition. Athletics provides an opportunity to practice the principles of life, such as subjecting one's self to authority, working together as members of a team, and controlling the emotions that arise in competition. Athletic competition offers an arena for the demonstration of our commitment to excellence and our desire to succeed through individual, team, and program goals.

Winning is of great importance to the program; thus the goal is to have everyone give his best so that winning is possible. However, the student-athlete and coach should realize that there are two victories - the moral and the physical - and the program must not sacrifice the moral victory to gain a physical victory. The goal should be to attain the moral victory at each practice and competition. The physical victory should be the next goal, and its meaning is made valid through the moral victory.

Coaches, teachers, and administrators are the role models for student-athletes. A coach should always be enthusiastic and prepared for each day's practice and have a schedule of events to help all student-athletes reach their

potential. A coach should be the leader in exercising self-control and displaying leadership.

A student-athlete has a responsibility to maintain high standards of personal integrity, leadership, and athletic accomplishment. These qualities are difficult to maintain unless the athlete accepts his leadership responsibility and constantly portrays those high standards. An athlete is looked upon as a leader by the school community and is constantly observed. A student-athlete may often feel pressure to perform for friends and family, but this motivation will not enhance an athletic program. A student-athlete should develop an inner desire to reach his fullest potential. The goal and motivation must be for each athlete to perform at his personal best to help the team achieve its goals.

ST. AGNES ACADEMY
ST. DOMINIC SCHOOL

ATHLETICS

Athletic programs which are based on the teachings of Christ provide the student with opportunities for learning which foster positive attitudes about self and others. Good sportsmanship, honesty, integrity, and fairness characterize the athletic program at SAA-SDS. The dignity and uniqueness of each student is respected, and character formation will not be sacrificed for a winning season. The philosophy of the athletic program flows directly from the mission and philosophy of the School.

Athletic directors and coaches determine the focus of the athletic program. The School selects men and women of upright character and integrity to serve as coaches, since they serve as role models for the student with whom they work.

A SAA-SDS Booster Club was founded in 1995 to assist efforts in promoting support for student athletes on the campus. All parents of children in grades 5-12 are urged to be active members of this organization. The Booster Club operates under the direction of the Athletic Director, and annual dues are minimal.

LAUSANNE LYNX ATHLETICS HANDBOOK

INTRODUCTION

Lausanne Collegiate School is a coeducational college preparatory school that strives to educate students with a holistic approach that combines academic integrity with athletic perseverance. The holistic approach focuses not only on the mind of the child but the body and spirit in developing the total individual. Lausanne emphasizes knowledge, truth and honor in every aspect of our daily lives; it is with these principles in mind that we can live a successful and meaningful life.

At Lausanne the education of each individual is the primary responsibility and athletics play a vital role in that educational process. Athletics should be viewed as a co-curricular endeavor rather than extracurricular, where the development of the student is paramount. Athletics participation at Lausanne will promote and facilitate working together for a common purpose. This type of focus will help the student athlete to develop a better understanding of others, which in turn helps with interpersonal relationships. The role of the coach in Lausanne's athletic department is vital and should be based on respect: respect for him/herself and respect for the student athlete.

Supreme Court, U.S.
FILED
MAY 22 2000
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No. 99-901

In The

Supreme Court of the United States

Brentwood Academy,

Petitioner,

v.

Tennessee Secondary School Athletic Association and Ronnie Carter, Executive Director and Individually,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of *Amicus Curiae* Southeast Law Institute in Support of Petitioner Brentwood Academy

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QUESTIONS PRESENTED FOR REVIEW

"Whether the regulatory conduct of a nominally private secondary school athletic association, which 'establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee,' . . . and whose 'membership consist[s] entirely of institutions located within the same State, many of them public institutions created by the same sovereign,' . . . constitutes state action under the Fourteenth Amendment and under 42 U.S.C. § 1983."

Brentwood Academy v. Tennessee Secondary Schools Athletic Association, et. al., **In the Supreme Court of the United States, No. 99-901, Petition For Writ of Certiorari, p. i.**

A. When such an association is controlled by public authorities who discriminate against nonpublic education, specifically religious based education, does that constitute state action and burden parental choice of education?

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I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Southeast Law Institute is an Alabama non-profit corporation interested in protecting the constitutional rights of persons, including the rights of religion, parental choice of education and equal protection through legal representation in the courts and evaluation of and comment on public policy in legislative, executive, and other administrative enactments. As a member of the Bar of this Court, Counsel to *amicus curiae* has participated in many related issues on behalf of other *amici curiae* before this Court.

As *amicus curiae*, the interest of the Southeast Law Institute is to defend the equal protection, religious and related fundamental constitutional rights of parents to choose nonpublic and specifically religious education as an alternative to public education and have protection from discriminatory state action in determining options and advantages in the education process. This *amicus curiae* is concerned with the status of an Alabama "athletic association" similar to the one in the case *sub judice*. As self-proclaimed private entities, such athletic associations violate important constitutional rights with virtual impunity.

Finally, this *amicus curiae* noted a singular lack of support in earlier filings by other *amici curiae* for the petitioner's position. On the other hand, there were numerous *amici curiae* filings in support of the respondent. There are constitutional interests at stake which are more

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[1] The parties have consented to the filing of this brief. Counsel for Southeast Law Institute authored this brief in its entirety. No person or entity, other than the Southeast Law Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

significant than the personal interests of the questioned associations.

II. SUMMARY OF ARGUMENT

State athletic associations are direct instruments of state education authorities for the control of all interscholastic athletics in a state. Public schools operated by the state are all included and cannot compete without membership. Nonpublic schools may join subject to the rules of the association.

Parents have the right to choose the educational method for their children. If they choose nonpublic education, particularly for religious reasons, they should not be discriminated against by state authorities. However, if they are, they should have a right of action and meaningful judicial review.

When state authorities in such athletic associations enact rules that benefit public schools and burden nonpublic schools, this violates constitutional rights of equal protection, religious freedom, parental choice of education, and other rights and privileges under the United States Constitution.

III. ARGUMENT

A. Parents' Rights and School Choice

The Sixth Circuit Court of Appeals' determination that the Tennessee Secondary School Athletic Association (TSSAA) is a private entity, burdens without meaningful recourse the parents' constitutional right to choose the method of educational instruction for their children. The right of parents to control the education of their children was first explicitly stated in *Meyer v. Nebraska*, 262 U.S. 390

(1923), when this Court found a parents' liberty interest guaranteed by the Fourteenth Amendment to be violated when a parochial school was denied the right to teach a foreign language to its students. Saying that "it is the natural duty of the parent to give his children education suitable to their station in life" (*id.* at 400), this Court found that the Nebraska legislature had "attempted materially to interfere with . . . the power of parents to control the education of their own." *Id.* at 401.

Relying on *Meyer*, very soon thereafter this Court addressed the parents' particular choice of educational method in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). An Oregon law required children to attend only public school. A religious school and a military academy challenged the law. The religious school offered a uniquely religious education (*id.* at 532), while the military school offered a uniquely military education. *Id.* at 533. The schools challenged the state law on the basis that it contravened a liberty right guaranteed by the Fourteenth Amendment. The right was enunciated by this Court:

> "Under the doctrine of *Meyer* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right,

> coupled with the high duty, to recognize and prepare him for additional obligations."

Id. at 534.

American history demonstrates education in early America was nonpublic, viz., basically church and home schooling, or was public, but in the sense that it was controlled by parents. Despite the establishment of town schools, parents were so prominently involved in their children's education that it was often difficult to distinguish "home" from "school".[2] Public education, that is education provided through state support and control, increased to the point that by the Twentieth Century, it was the predominant method of education and had become a most important function of a state. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Nonpublic education, primarily in the nature of private preparatory or Catholic parochial schools coexisted. As a partial result of 1960's and later court cases removing religious influences from public schools,[3] religious based or church schools began to reappear as an important alternative choice of educational method.

With a sincerity no less important than the Amish in *Yoder*, *supra*, parents have worked within their churches to set up fully functioning and usually accredited church schools. In a world that is seen to be increasingly secular,

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[2] Lawrence Cremin, *American Education: The Colonial Experience, 1607-1783* (New York: Harper and Row, 1970), p. 192. *Also see*, William T. Davis, *History of the Town of Plymouth* (Philadelphia: J.W. Lewis & Co., 1885), p. 52.

[3] *Engle v. Vitale*, 370 U.S. 421 (1962) (removing daily prayer); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (removing Bible reading and the Lord's Prayer); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding unconstitutional anti-evolution statute); *Stone v. Graham*, 449 U.S. 39 (1980) (removing the Ten Commandments).

parents have chosen religious based education in order to give their children a complete education but with an appropriate religious world view.

As in many states, Alabama had a cognizable growth of religious based education. In recognition of the rights explained in *Meyer*, *Pierce*, and *Yoder*, in 1982 the Alabama legislature promulgated a number of laws recognizing the right of parents to make a choice for church school education. While public schools are required of the State of Alabama under Article XIV, Section 256, 1901 Constitution of Alabama, church schools are permitted as an educational choice as defined by Section 16-28-1, *1975 Code of Alabama*. In deference to the First Amendment, church schools are not required to register with or report to the state (*id.* Section 16-1-11), and they are recognized as alternative methods of education along with public schools. *Id.* Section 16-28-3. Other private forms of education are permitted, but with more regulation. *Id.* Section 16-46-5.

In more recent years, there has been a crisis in urban public education. With the growth of nonpublic education, particularly religious based schools, the parental right to choose the educational method has become more significant. Issues of school choice, use of public funds for private tuition, vouchers, tax credits and similar measures are currently being legislated and litigated. Whether public funds may ultimately be used for nonpublic education is one issue, but the increasing incidence and right of parental choice remains unaffected.

The parents' choice of alternative nonpublic education may be for one or several reasons, which might include a desire for religious based instruction, college preparation, a different educational environment, to escape zoned public education for scholastic, safety or other

reasons, or the appeal of a particular nonpublic program. Whatever the reason and choice of method, all include scholastic achievement and most involve athletic participation. Athletics are an integral and important part of the education process. See *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 98 and 122 (1984); *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 449 (1938); *Todd v. Rush County Schools*, 133 F.3d. 984, 986 (7th Cir. 1998); *Knapp v. Northwestern* University, 101 F.3d. 473 (7th Cir. 1996); *U.S. ex rel. Missouri State High School Activities Association*, 682 F.2d. 147, 151 (8th Cir. 1982).

While school choice may depend primarily on scholastic needs or desires, the availability of scholarships through athletic excellence may be a significant concern of parents. This concern has more significance for low income families who may choose religious based education, while at the same time hoping for athletic excellence to result in a college scholarship for their gifted athletic child.

College athletes come from high schools. Most high schools are public with a lesser number private and an even lesser number religious. State athletic associations, such as the TSSAA and for the State of Alabama, the Alabama High School Athletic Association (AHSAA), are set up to handle all interscholastic athletic competition. This includes predominately public school competition, but permits nonpublic schools to participate as well. Regardless of choice of educational method, if a gifted student athlete wants recognition or desires rigorous competition, the school which he attends must participate in the statewide athletic association program.

B. Unconstitutional Treatment of Nonpublic School Choice

The issue in the case *sub judice* is whether such state athletic associations are state agencies and therefore subject to constitutional requirements, or are they merely private entities subject to the most minimal judicial review? It is in that same context that the issue in Alabama, as well as all other states, becomes one of parental choice, free exercise of religion and equal protection, similar to the free speech issue in the case *sub judice*. Appendix "A" is a letter explaining a recent change in "private school" classification (all nonpublic schools including church schools) in the AHSAA. The classification regulation that is referenced in the letter at Appendix "A" states:

> "High schools are divided into six classifications (1A, 2A, 3A, 4A, 5A, 6A) for competition in championship programs.
>
> Classification is based on Average Daily Membership (ADM) figures furnished by the State Department of Education for the upper three grades plus ninth grade holdbacks. The largest schools are placed in Class 6A, the next largest in Class 5A, etc.
>
> **Note:** Effective with the 2000-2001 school year, an index of 1.35 will be used to determine the enrollment of each private school for the next classification period (2001-2002). Each private school shall count 1.35 for classification purposes.

1999-2000 Handbook, Alabama High School Athletic Association, p. 66.

As an explanation for that provision, the letter at Appendix "A" suggests the reason for the multiplier is because private schools have a thirty-five percent higher level of student participation. This "classification" is the level of competition at which a school will play. The more the enrollment, the higher the classification, the fiercer the competition. This private school multiplier seems unfair and unbased on its face. Smaller private schools will be required to play larger public schools. This will penalize those students because of their parents' choice of nonpublic education.[4]

C. State Control of Athletic Programs

Why should a nonpublic school participating in the athletic program be penalized merely because its students are more dedicated to the task? In many of these cases there are issues of athlete recruitment and other methods by which nonpublic schools may get athletes while public schools must rely on zoned districts for their athletes. Assuming there is a debate about the reasonableness of the AHSAA rule, is there an appropriate forum with jurisdiction for review?

The Eleventh Circuit has not addressed whether the AHSAA is a state agency for federal constitutional purposes.[5] Nor has any Alabama case addressed whether, as

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[4] This *amicus curiae* realizes there is no evidence before the Court and this matter is only explained for the purpose of offering an example.

[5] Since October 1, 1981, the date when the Eleventh Circuit Court of Appeals was established, there has been no case addressing this issue. However, prior to that time, the Fifth Circuit Court of Appeals had determined that a state high school athletic association was a state

a matter of state or federal law, the AHSAA is a state agency. The only reference to such an issue was in *Kubiszyn v. Alabama High School Athletic Association*, 374 So.2d. 256, 257 (Ala. 1979), where the Alabama Supreme Court stated it would not decide such an issue, but in conflicting statements said it would not interfere with the decision making process of the association:

> We need not decide whether there could be circumstances under which the Constitutions of the United States and the State of Alabama would be violated by restrictions on a student's participation in high school sports . . .
>
> * * *
>
> If officials of a school desire to associate with other schools and prescribe conditions of eligibility for students who are to become members of the school's athletic teams, and the member school's vest final enforcement of the association's rules and boards of control, then a court should not interfere in such internal operation of the affairs of the association.

This leaves the legal question open and schools, public and nonpublic, subject to the dictates of the AHSAA as a self-proclaimed "private agency." *1999-2000 Handbook, Alabama High School Athletic Association*, p. 72; see also http://www.ahsaa.com.

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agency. *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d. 224, 227 (5th Cir. 1968). This decision would be applicable to the Eleventh Circuit Court of Appeals pursuant to *Bonner v. City of Pritchard*, 661 F.2d. 1206 (11th Cir. 1981).

The state athletic associations are entities to which the state has delegated its authority to organize all public secondary athletic activities in the state. The AHSAA, like the TSSAA and similar associations, are programs controlled and operated by public school authorities. They are not private organizations like the Boy Scouts of America or the South Boston Allied War Veterans Council. See *Boy Scouts of America v. Dale*, 734 F.2d. 1196 (N.J. 1999), *cert. granted*, _____ U.S. _____, 120 S.Ct. 865 (2000); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

The governance of the AHSAA and its Constitution, By-laws, and other regulatory provisions indicate its symbiotic familial relationship with state public school and education agencies and employees. The AHSAA is regulated by a thirteen member Central Board of Control composed of twelve public school employees and one Alabama State Department of Education employee, and a thirty-two member Legislative Council consisting of four members from each of eight district boards in the state which currently has thirty-one public school employee board members and only one private school employee board member. See http://www.ahsaa.com. Employees of the AHSAA are members of the Teacher's Retirement System of Alabama, just like public school teachers. Section 16-25-7(a), *1975 Code of Alabama.*

It is not statutes or regulations that make the associations state actors. It is the authority the states have delegated to them and their conduct which is state action and therefore, makes them persons subject to 42 U.S.C. § 1983 and other process. *Walsh v. Louisiana High School Athletic Association*, 616 F.2d. 152, 156 (5th Cir. 1980).

D. Unconstitutional Discrimination Without Remedy

The reason for providing this information to the Court is to show that like Tennessee, Alabama has an athletic association which is highly regulated by state officials. It conducts all of the athletic activities of all public schools in the state, along with those nonpublic schools which wish to participate. It dictates requirements and makes rulings which are discriminatory to nonpublic choices of education, but without a meaningful remedy. This *amicus curiae* would agree that the AHSAA, or any other state association, whether it is public or private, may make rules to which the school who wishes to participate must agree, otherwise, they should not join the association. However, once the state controlled association makes those rules and invites participants, there should not be unequal treatment or hostility toward nonpublic alternative choices of education.

In addition to the right under the liberty interest of the Fourteenth Amendment of parents to choose education method (*Meyer*, 262 U.S. at 400 and *Pierce*, 268 U.S. at 534), is the right to base the choice on religious grounds. *Yoder*, 406 U.S. at 214. If the parents' choice is weighed with knowledge that their child will not be able to fairly compete in interscholastic athletics, the freedom of that educational choice and the freedom of religious exercise is unconstitutionally burdened. If parents believe the opportunities their child may receive in the nonpublic religious school will be substandard, then the choice is not really free and not really a right. Parents do not receive equal protection of the law and are denied religious freedom because their religious choice has put them in an unequal position.

Parents should not be required to choose between a secular education with athletics and a religious education without athletics for their child. This is particularly true when the dilemma is caused by a state agency acting without a proper reason, whether its interest be legitimate or compelling. In reality, such athletic associations are state agencies which cannot exhibit hostility and bias toward religious and private entities, but must maintain neutrality. Specifically for religious based schools, these associations are no different than other public agencies who have been constrained by this Court in cases such as *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 and 839 (1995) (maintaining lawful boundaries of the forum set by the state and the guarantee of neutrality in governmental policies and benefits towards religion) and *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 704 (1994) (requiring the civil power to be exercised in a neutral manner to religion and the making of governmental benefits available to religious persons and groups). Additionally, if a church school cannot equally compete, this is a direct burden which violates not only the First Amendment to the U. S. Constitution, but the Alabama Religious Freedom Amendment, Amendment No. 622, 1901 Constitution of Alabama:[6]

> A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it burdens the free exercise of religion.

Yoder, 406 U.S. at 320.

---

[6] Voters in Alabama adopted the "balancing" or "compelling interest test" commonly applied prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), at a November 3, 1998 referendum.

The hostility is obvious in the case *sub judice* when the TSSAA stated at page 15 of its Brief in Opposition to the Petition for Writ of Certiorari that ". . . while it may be unpalatable to Brentwood Academy to withdraw from TSSAA and no longer be in a position to hold itself out as a TSSAA football champion, Brentwood Academy nevertheless retains the option of withdrawing from TSSAA if it does not wish to comply with the TSSAA ruling." This hostility is endemic and pervasive in the competition between public and nonpublic education, both academically and athletically. The dominance of public schools in the management of athletics through their so-called private associations is an unlawful and unfair advantage, removing from them constitutional restrictions and permitting them to be self-governing without meaningful court review.

When this happens, there is an unconstitutional discrimination by persons or entities to whom the state has delegated authority to do what the state ordinarily would do. These so-called private associations believe they can discriminate with impunity since they are not state actors. This is an ingenious device, if it is allowed to work.

It is ludicrous to suggest states would do away with interscholastic athletics if there were not these private associations. Clearly, athletics is an integral part of the educational process. While it is alleged the TSSAA bars independent schools from contacting students and therefore denies their speech rights, the AHSAA prescribes unequal rules unconstitutionally burdening parental choice of educational method which is particularly egregious when the choice is based on a religious belief or compulsion. Both are intended to diminish nonpublic competition, but without constitutional scrutiny.

Public officials must be accountable. Healthy competition among alternative school methods, both scholastically and athletically, is at stake. For whatever reasons parents exercise there constitutional rights to choose an alternate to public education, those parents should have the assurance that their children will receive all of the same benefits and opportunities to compete in the public square without unconstitutional treatment.

IV. CONCLUSION

This *amicus curiae* urges the Court to grant the relief sought by the petitioner and find the TSSAA to be a state agency. Upon such finding, all similar athletic associations in the states will be required to treat parents and alternative education with the same fairness otherwise required of states under the Constitution.

For the reasons set forth above, *amicus curiae*, the Southeast Law Institute, respectfully suggests that the judgment of the Sixth Circuit Court of Appeals be reversed and an order be entered as suggested above.

Respectfully Submitted,

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APPENDIX

Appendix "A"

AHSAA
Alabama High School Athletic Association
P.O. Box 5014
926 Pelham Street
Montgomery, AL 36103-5014
PHONE: (334) 242-5654 · FAX: (334) 240-3389

Dear (name withheld by request):

I am in receipt of your letter expressing your dismay with the passage of the enrollment index of 1.35 used for private school enrollment for the 2000-2001; 2001-2002 classification period. After much discussion by the Central Board of Control and the Legislative Council at its March meeting, an attempt was made to keep the private schools as participating members of the Alabama High School Athletic Association as they have been for many, many years.

It is the understanding of this office, that most private schools are selective in their enrollment practices, that some students may or may not qualify for various reasons and that their application for enrollment may be denied. It is also a known fact that private schools charge tuition fees in order to attend those institutions, thereby eliminating some students whose parents may not be able to afford to send their sons or daughters to a private institution. In contrast, a public school must enroll any individual within their school's zone regardless of mental aptitude, financial wealth, or any of the character traits that may eliminate students from private school enrollment.

A study of participation in interscholastic athletics within the public schools revealed that 33% of those students enrolled participate in interscholastic athletics. That same study within the private school sector reveals that 68% of the students enrolled participate in interscholastic athletics. This study as well as the above statements forms the basis for using the 1.35 index.

Certainly the Central Board of Control and the Legislative Council are willing to hear from any member school within the state, as I am, concerning this matter. The committee that was put into place by the President of the Central Board of Control will continue to address these problems and changes will be made in the future that will better address all concerns.

I look forward to meeting with you if you still request a conference in order to discuss this matter. Please call to set up a suitable time for us to meet. Thank you and (name withheld by request) Christian School for your spirit of cooperation in working to resolve this matter.

Sincerely yours,

s/Daniel L. Washburn

Daniel L. Washburn
Executive Director

Supreme Court, U.S.
FILED
MAY 22 2000
OFFICE OF THE CLERK

No. 99-901

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE TENNESSEE LAWYERS' ASSOCIATION FOR WOMEN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Tennessee Lawyers' Association for Women (hereinafter, sometimes, "TLAW") is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. Its interest in this appeal is threefold.[1]

First, this case is relevant to TLAW because, if the Tennessee Secondary Schools Athletic Association (hereinafter, "TSSAA") is not held to be a state actor, and if its actions in governing high school athletics in Tennessee are not held to constitute state action, then women will be foreclosed from challenging the TSSAA's actions and decisions, or actions taken pursuant to its governance, on constitutional grounds, such as denial of equal protection or due process of law. For example, the TSSAA and its member schools will be free to deny female athletes fair access to athletic programs and facilities. Indeed, the TSSAA has done so in the past. If such actions or decisions occur, it cannot be certain that there would be a statutory remedy. The right to challenge the actions of the TSSAA and its member schools on constitutional grounds must be preserved.

Second, the interests of the *schools* that are members of the TSSAA are represented in this Court. In addition, the interests of the *students* who participate in high school athletics need to be underscored. While TLAW is not an official representative of those students and their families, it is appropriate for several points to be made on their behalf in order for this Court to gain perspective.

---

1. This *amicus curiae* Brief is being filed with the consent of all parties pursuant to Rule 37.3(a) of the Rules of the Supreme Court of the United States. The parties' consents are being lodged separately with the Court. As required by Rule 37.6 of the Rules of the Supreme Court of the United States, *amicus curiae* TLAW states that counsel for a party did not author the accompanying brief in whole or in part, and further states that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this Brief.

Third, TLAW believes that participation in athletics is a beneficial way for young women to excel. Through athletics, they gain and strengthen many qualities which would serve them well if they should later enter the legal profession as lawyers, paraprofessionals, or nonprofessionals. These qualities include, among many others, leadership, perseverance, the ability to cooperate with others, organizational and time management skills, and a sense of fair play. The legal profession benefits from counting among its numbers both professional and nonprofessional women who have participated in athletics during their youth.

TLAW does not take a position upon the substantive merits of this case, *i.e.*, the constitutionality or validity of the so-called Recruiting Rule imposed upon independent schools by the TSSAA. Further, it does not take a position upon the relative benefits or advantages of public versus private schools. It wishes only to address the issue of whether the TSSAA is a state actor and whether its governance of high school athletics is state action.

SUMMARY OF THE ARGUMENT

This case is not the first time a court has addressed whether or not the TSSAA is a state actor. Every previous case has either been based upon the premise that the TSSAA is a state actor, or has affirmatively ruled that it is a state actor. There is no indication that the detailed facts recited by the District Court in its opinion in *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998) have in any way changed over the years, except for the amendment of a rule adopted by the Tennessee Board of Education in 1995.

Education in Tennessee is guaranteed by the Tennessee Constitution. Title 49 of the Tennessee Code creates the Tennessee Department of Education and expressly contemplates that the Department has jurisdiction over private schools. The State Board of Education has adopted rules that implement its

powers to govern all aspects of education, including the accreditation of private schools by setting detailed standards.

The rules of the Board of Education also assert governance over secondary school interscholastic sports. This is accomplished through the TSSAA, with which the Board of Education has had a relationship for decades. In 1972, the Board enacted a rule designating the TSSAA to be the body to govern secondary school interscholastic sports. In 1995, the Board amended the rule to recognize the TSSAA as the body that governs secondary school sports, and to authorize schools to continue to belong to the TSSAA.

The District Court ruled in this case that under the facts and the law, the TSSAA is a state actor. The Sixth Circuit Court of Appeals reversed, holding that the TSSAA is not a state actor. The Sixth Circuit is in error and this Court should reverse its ruling because the only change of circumstances in this case is the amendment of the Board of Education's rule (which was amended as a shield against litigation), and because the facts of this case are closely parallel to the facts in cases in which other states' secondary school athletic associations have properly been held to be state actors.

The existence of state action must be determined based upon the facts as they actually exist, and not upon mere semantics or nomenclature.

TLAW asserts that all tests for finding state action have been met, including the "membership/control" and the "joint participation" tests. This result is fully supported by *NCAA v. Tarkanian*, 488 U.S. 179 (1988). The Sixth Circuit misconstrued Footnote 13 in that case, *id.* at 193 n.13.

TLAW also respectfully asserts that the Court should consider the "public function" test, as well, even though that test is not pressed by the Petitioner, Brentwood Academy. The public function involved in this case is education, not high school sports. This Court is requested to rule that education is a public

function under *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) and *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

TLAW believes that the position of Petitioner, Brentwood Academy, is supported by the case of *United States v. Virginia*, 518 U.W. 515 (1996), ruling that Virginia must afford to women students the same opportunity to attend a school of high caliber, operated under the "adversative system," that it affords to male students who attend the Virginia Military Institute.

High school sports are an integral and important facet of education. The Board of Education and the TSSAA have admitted this in their own statements. In light of this fact, this Court should consider the effect that its ruling will have upon students.

The schools, public and private, which are members of the TSSAA exist for the benefit of the students and the community. A school cannot be isolated from its students. It is the lives, educations and futures of the students that will be detrimentally affected if the TSSAA is held *not* to be a state actor. If the TSSAA is allowed to avoid state actor status based upon the wording of a rule that was adopted precisely to serve as a shield from litigation, it must be anticipated that all other states will take the same steps. The consequence of this will be that state athletic associations will be able to deny female students their constitutional rights, possibly without any statutory redress.

Consequently, TLAW requests that the ruling of the Sixth Circuit be reversed, that this Court rule that education is a public function, and that the judgment of the District Court be reinstated.

ARGUMENT

I.

THE TSSAA HAS ALWAYS BEEN CONSIDERED A STATE ACTOR.

A. Court Decisions Have Treated the TSSAA as a State Actor.

Over years, in several federal court decisions, the TSSAA has been considered a state actor. Furthermore, in several of the cases, the TSSAA did not even argue otherwise. Thus, constitutional requirements were either deemed to apply, or were expressly held to apply. *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) (TSSAA presumed to be state actor); *Graham v. TSSAA*, 1995 WL 115890 (E.D. Tenn. 1995), *appeal dismissed* (mootness), 107 F.3d 870 (Table), 1997 WL 76958 (6th Cir. 1997) (TSSAA held state actor under *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990) (TSSAA held state actor because of state delegation of authority and composition of TSSAA's membership); *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976) (TSSAA presumed to be state actor; held that prohibiting girls from playing on a mixed high school baseball team was unconstitutional; determination did not stand or fall on whether or not TSSAA was "designated" rather than "authorized" to govern interscholastic sports; TSSAA simply did, in fact, govern interscholastic sports); *Kelley v. Metropolitan County Board of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968) (TSSAA held state actor, over its assertion, among other things, that it was a voluntary association).

B. The Sixth Circuit's Efforts to Distinguish Prior Cases Do Not Withstand Scrutiny.

In finding that the TSSAA is not a state actor in this case, the Sixth Circuit distinguished its earlier opinion in *Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n*, 647 F.2d 651 (6th Cir. 1981).

Brentwood Academy v. TSSAA, 180 F.3d 758, 764-765 (6th Cir. 1999). In *Yellow Springs*, the Court of Appeals examined the Ohio High School Athletic Association and found, based on factors which closely parallel those here, that the OHSAA was a state actor based on the so-called "joint participation" test. In *Brentwood Academy*, 180 F.3d at 765, the Court of Appeals distinguished *Yellow Springs* by saying that the finding of state action had been dictum because the OHSAA's actions violated Title IX. This may be why *Yellow Springs* might not bind the Court of Appeals, *per se*, but it ignores one decisive point: It defies logic to hold that the OHSAA was a state actor and the TSSAA is not. The same badges of joint participation exist in *Brentwood Academy* as existed in *Yellow Springs*.

The fact that these earlier courts did not all engage in exhaustive analyses of the question does not mean that the decisions or assumptions of the courts were not correct. Rather, it means that the TSSAA's status as a state actor is obvious and that exhaustive analysis is not needed.

II.

THE 1995 AMENDMENT TO THE BOARD OF EDUCATION'S RULE DID NOT CHANGE THE TSSAA'S STATUS AS A STATE ACTOR.

The District Court meticulously developed the overwhelming evidence that the TSSAA is a state actor. *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670, 673-685 (M.D. Tenn. 1998). The Sixth Circuit Court of Appeals almost entirely ignored this evidence. *Brentwood Academy v. TSSAA*, 180 F.3d 758, 762 (6th Cir. 1999). The Court of Appeals recited very few facts in support of its conclusion that the TSSAA is not a state actor, and the facts that it recited were largely irrelevant. *Id.* It relied heavily upon a change in the rules purporting to articulate the relationship between the Tennessee Board of Education (hereinafter, the "Board") and the TSSAA, saying only that the former rule had been "repealed." *Id.*

The TSSAA has governed high school interscholastic sports since the 1920's. 13 F. Supp. 2d at 675. In 1972, the Board issued a rule that designated the TSSAA "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Id.* at 680.

In 1995, the Board changed the wording of the rule. The District Court perceived that this change was a shield to protect the TSSAA against just such litigation as this. *Id.* at 681. The new rule reads:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Id.

This is a distinction without a difference. There has been no meaningful change in the true relationship or operations of the Board and the TSSAA.

Interestingly, the unchanging nature of the relationship was pointed out with pride at page 2 of the Respondents' Brief in Opposition to the Petition for Writ of Certiorari (hereinafter, "Brief in Opposition"). It stated that the Board's promulgation of the 1972 rule had no effect on the manner in which the TSSAA operated.

In making this point, the TSSAA falls on its own sword. If the enactment of the "delegation" rule in 1972 had no effect upon the actual relationship between the entities, neither did the 1995 amendment which changed the wording of the rule from "delegate," etc., to "recognize" and "authorize."

Since the TSSAA implicitly conceded that the functional reality of its relationship with the Board was decisive when the Board enacted the 1972 rule, the Sixth Circuit — as the District Court did — should have analyzed the functional reality of the relationship when it examined the effect of the Board's 1995 amendment.

Yet the Sixth Circuit considered only that the 1972 rule was "repealed" in 1995, as if this made the decisive difference in the TSSAA's status. The Sixth Circuit did not consider *why* the 1972 rule was changed. The reason was presumptively as a shield against litigation. 13 F. Supp. 2d at 681. There is certainly no indication that other factors listed by the Sixth Circuit in concluding that the TSSAA is not a state actor — e.g., expenses being paid out of gate receipts from games — have meaningfully changed since the 1972 rule was in effect.

This Court has held that a court considering whether state action exists must examine the actual facts, and not just the technical or legal relationship. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999); *United States v. Virginia,* 518 U.S. 515, 539 (1996); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974); *Evans v. Newton*, 382 U.S. 296, 301 (1966).

III.

THE STATE OF TENNESSEE IN FACT REGULATES PRIVATE SCHOOLS.

The TSSAA postures itself as if its regulation of private school participation in interscholastic sports were simply an afterthought — as if its private school members were merely incidental to its real purpose, which is to regulate public school participation in interscholastic sports. Of course, one would expect that the overwhelming majority of TSSAA member schools would be public. This fact does not make its governance of private schools any less a part of the entirety of the Tennessee

education system — just as its governance of high school sports in general is part of the overall Tennessee education system.

In actuality, the State does regulate private schools in Tennessee, and has a substantial interest in doing so.

Tenn. Code Ann. Title 49 governs education in Tennessee. Tenn. Code Ann. § 49-1-201 (1996) sets forth the powers of the Commissioner — *i.e.*, the Department — of Education. Section 49-2-201(c)(19) makes it clear that the Department of Education has substantial powers over private schools:

> The commissioner shall provide direction through administrative and supervisory activities designed to build and maintain an effective organization as follows:
>
> . . .
>
> (19) Inspect, approve and classify such private schools of grades one (1) through twelve (12), as well as nursery schools and/or kindergartens, or any combination of these, as shall request such inspection, approval and classification; provided, that the same standards as are used for the approval and classification of the public schools shall be used for such inspection, approval and classification; . . .

Tenn. Code Ann. § 49-1-301 (1996) sets forth the powers and duties of the Board. Pursuant to § 49-1-301, the rules of the Board contain Chapter 0520-7-1, pertaining to Administrative Rules for Non-Public Schools, and Chapter 0520-7-2, pertaining to Non-Public School Approval Process. A copy of these Chapters is appended to this Brief as Appendix A.

Among the rules governing private schools is Tenn. Bd. of Ed. Rule 0520-7-2-.03(6)(c)9, which requires that to be approved to accredit private schools, accrediting agencies must

> Publish and follow minimum standards using the following criteria (or the agency may use the standards as set forth in the Rules, Regulations and Minimum Standards for the Governance of Public Schools in the State of Tennessee):
>
> (i) Curriculum and Graduation:
>
> I. The program shall include (but not be limited to) the areas of reading, composition, speech, mathematics, social studies, science, art, music, *health and physical education*. . . .
>
> III. Each student shall meet the same minimum requirements for graduation as students in public schools. The specific requirements are listed in Chapter 0520-1-3.

(Emphasis added).

Moreover, "Category I" schools are those directly approved by the Department of Education. Tenn. Bd. of Ed. Rule 0520-7-2-.01(1)(a). The criteria and procedures for evaluating such schools are the same as for public schools. Tenn. Bd. of Ed. Rule 0520-7-2-.02(1).

Also, it is significant that students can transfer between public and private schools without loss of credit for completed work. Tenn. Bd. of Ed. Rule 0520-7-1-.03.

In this context of wider regulation than merely sports, the Court must assess as state action the TSSAA's governance of private as well as public secondary schools' interscholastic athletics. The incidents of this governance are very thoroughly discussed in the Brief of Petitioner, Brentwood Academy, and in the District Court opinion, 13 F. Supp. 2d at 673-685. The TSSAA's governance of private school athletics is part of a much larger whole.

IV.

IT IS IRRELEVANT THAT PETITIONER, BRENTWOOD ACADEMY, IS A PRIVATE SCHOOL.

A. *NCAA v. Tarkanian* Supports a Finding that the TSSAA is a State Actor.

The question before this Court is whether the TSSAA is a state actor. Either it is a state actor, or it is not. It cannot be a state actor with respect to some of the schools that it governs, without being a state actor as to the other schools that it governs.

There has been much discussion of Footnote 13 of the *Tarkanian* case, *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988). This footnote states, in its entirety:

> The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, *many of them public institutions* created by the same sovereign. See Clark v. Arizona Interscholastic Association, 695 F.2d 1126 (CA9 1982), cert. denied, 464 U.S. 818, 104 S. Ct. 79, 78 L. Ed. 2d 90 (1983); Louisiana High School Athletic Association v. St. Augustine High School, 396 F.2d 224 (CA5 1968). The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership. See post, at 202, n. 2.

Id. at 193 (emphasis added).

This footnote and the text to which it relates are thoroughly discussed in the Brief of Petitioner, Brentwood Academy. The "situation" referred to in Footnote 13 is the fact that the NCAA is a national organization governing collegiate sports, comprised of colleges and universities all over the country. The NCAA does not derive any meaningful authority from the State of Nevada. Therefore, it is not a "state actor" in connection with Nevada. *Id.*

The majority opinion in *Tarkanian* was addressing the "membership/control" test in the text relating to Footnote 13. It correctly held that the NCAA was not a state actor of the State of Nevada because of the absence of control over the NCAA by the State of Nevada. Footnote 13 contrasted that fact situation to the fact situation that would exist if the schools controlled by the athletic association were all within one state.

The four dissenting Justices in *Tarkanian* would have found state action under the "joint participation" test. *Id.* at 202. Thus, Footnote 13 was a comment by the majority in response to the dissent. But the majority and the dissenting Justices were addressing two different tests for state action. The Sixth Circuit failed to recognize that distinction. 180 F.3d at 766.

The Sixth Circuit's interpretation of Footnote 13 is refuted by the language of the footnote itself. The first sentence of the footnote reads: "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, *many of them public institutions* created by the same sovereign." Clearly, the majority was conscious of the fact that not all schools within one state, which might be governed by a state's athletic association, would be public schools. It is impossible to read Footnote 13 and conclude that a state athletic association that governs both public schools and private schools is a state actor when governing public schools and not a state actor when governing private schools. Footnote 13 simply does not stand for that proposition.

It is ironic, for the Sixth Circuit and the TSSAA, that the last sentence of Footnote 13, which was relied upon by the Sixth Circuit in finding that the TSSAA was not a state actor, was a reference to the dissent. The dissenting Justices would have held that the NCAA was, indeed, a state actor under the "joint participation" test. TLAW respectfully asserts that even under the dissent in *Tarkanian*, the TSSAA is a state actor when governing intra-state private schools. In *Tarkanian*, the "concert" in question was between a single school within a state and the

national governing body, which was not based in Nevada. In the instant case, the TSSAA is an intra-state body, and the concert in question is both (1) between the TSSAA and its governing body, the Board and (2) between the TSSAA and the entire school system of Tennessee.

Additionally, as is discussed in Section III at pages 8-10, *supra*, the State of Tennessee governs and regulates private schools beyond simply their interscholastic sports.

B. The Facts Present in this Case Demonstrate the Irrelevance of Private Versus Public School Status.

i. The TSSAA's Rules Affect Both Public and Private Schools and Students.

The District Court pointed out that the Recruiting Rule, which is the basis for Brentwood Academy's First Amendment challenge, actually constrains both public and private schools. 13 F. Supp. 2d at 686-691. What emerges is that public schools, as well as private schools, are affected by the Recruiting Rule. If the TSSAA is a state actor in limiting the ability of a public school coach to contact a potential student athlete based upon a "feeder pattern," the TSSAA is also a state actor when imposing such a limitation on a private school coach.

Further, the TSSAA's actions affect not only *schools*, but also *students*. The rights of public school students are affected by the TSSAA's governance in general, and by the Recruiting Rule in particular. This is not simply a matter of a challenge by a private school. The rights of an individual student must not depend on whether he or she attends a public or private school.

ii. The TSSAA is Controlled by Public Officials.

The TSSAA will always be dominated by public school officials. The preponderance of public over private schools that are members will be outcome determinative. Thus, it does not matter that there may be an occasional or a few members of its governing body that are private school officials. There will never

be sufficient private school membership to allow private schools the possibility of setting policy. Mere private school *participation* cannot remove the cloak of state action, since public *control* remains firmly in place. TSSAA cannot escape state actor status by setting aside some token representation by private school officials.

iii. Public and Private Schools Use Each Other's Property.

There is also a blurring of the line of demarcation when one considers the fact that public and private schools use each other's facilities for events. Private school students, parents, coaches and faculty enter onto public property when they play games at public schools. Public school students, parents, coaches and faculty enter onto private school property when they play games at private schools.

V.

THE TESTS FOR FINDING STATE ACTION ARE MET IN THIS CASE.

A. The "Membership/Control" and "Joint Participation" Tests Are Met.

The Brief of Petitioner, Brentwood Academy, and the District Court opinion, 13 F. Supp. 2d at 679-685, thoroughly discuss the tests for judging whether an entity is a state actor, including the "membership/control" and "joint participation" tests. TLAW will not here attempt to duplicate its discussion.

TLAW underscores the undisputed facts of this case, which were discussed in great detail in the District Court opinion, and which the District Court found to be "overwhelming," 13 F. Supp. 2d at 683, but were not discussed in any meaningful way in the Court of Appeals opinion, 180 F.2d at 763-764.

As to "control," it must be emphasized that the Board's own rules affirmatively state that the TSSAA's rules are subject to its approval. By definition, this is control. Why would the

Board approve the TSSAA's rules if it did not believe that the TSSAA was under its aegis? What purpose would be served if the Board knew that its approval was of no force or effect — or, as the TSSAA says, that it was "ceremonial," Brief in Opposition at 3. TLAW is not aware that the *Board* has ever characterized its own role as "ceremonial," and wonders if it would be surprised that its role is so described. Would the Board consider its role "ceremonial" if the TSSAA usurped some clear authority of the Board, or did something that contravened the Board's policy, or that exposed it to litigation?

The District Court's opinion irrefutably points out why the TSSAA's characterization as "ceremonial" was completely untrue. 13 F. Supp. 2d at 680-681. The District Court concluded its chronology of the Board's pattern of active review and approval of the TSSAA's rules, over a period of years, by saying,

> It is disingenuous, at best, for Defendants to repeatedly state in their briefs, based upon testimony of Defendant Carter, TSSAA Executive Director, and Mr. Sailors, State Board of Education Executive Director, that the State has never reviewed or approved TSSAA rules. Such an assertion is utterly false, as demonstrated by the minutes of the State Board of Education.

Id. at 681.

The analysis of whether an entity is a state actor may be a complicated one in some cases. In this case, TLAW respectfully contends that the analysis is quite simple. As this Court observed in *Tarkanian*,

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar,* 457 U.S., at 936-937, 102 S.Ct. at

2753-2754. When Congress enacted [42 U.S.C.] § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961). As we stated in *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

. . . In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); if it delegates its authority to the private actor, e.g., *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, e.g., *Burton v. Wilmington Parking Authority, supra*. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

488 U.S. at 191-192.

> E.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself").

Id. at 192 n.12.

B. Judge Merritt's Dissent and *Communities for Equity* are Persuasive.

TLAW respectfully urges this Court to adopt the reasoning of Judge Merritt in his dissent from the Sixth Circuit's denial of the Petitioner's Motion for Rehearing, *Brentwood Academy v. TSSAA*, 190 F.3d 705 (6th Cir. 1999), and the reasoning of the United States District Court for the District of Michigan in *Communities for Equity v. Michigan High School Athletic Association*, 80 F. Supp. 2d 729 (W.D. Mich. 2000). These opinions demonstrate a full understanding of the issues and principles governing a proper analysis of the issue before the Court in the instant case.

C. The "Public Function" Test Is Also Met.

TLAW acknowledges that Petitioner, Brentwood Academy, does not press the argument that the TSSAA is a state actor under the "public function" test. Petition for Writ of Certiorari at 29, footnotte 18. However, TLAW requests that the Court consider this additional argument by TLAW, *see United States v. Dickerson*, 166 F.3d 667, 680-681 (4th Cir.), *cert. granted*, __ U.S. __, 120 S. Ct. 578 (1999).

The TSSAA argues that the "public function" test for state action is not met. Brief in Opposition at 11. It argues that coordination of amateur sports is not a function that is traditionally performed by states. Brief in Opposition at 12. Even if the "public function" test be considered weaker than the Petitioner's arguments that the "membership/control" and

"joint participation" tests are met, TLAW does not concede that the "public function" test does not apply here, or that the test fails under the facts of this case.

The TSSAA relies on cases such as *Rendell-Baker v. Kohn*, *supra*, 457 U.S. 830, 842 (1982) and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). These cases are not on point. *Rendell-Baker* dealt with whether a single private school was a state actor. TLAW is certainly not asserting that a traditional private school would be a state actor. The instant case is distinguishable because it is the governance of an entire aspect of the education system in Tennessee that is being challenged. *U. S. Olympic Committee* is distinguishable because the kind of amateur sports referred to in that case were not high school sports governed as part of a state's education system.

i. The "Public Function" is Education, Not Sports.

The TSSAA's and the Board's own literature emphasizes the importance of athletics. The 1995 Board rule itself states that the Board "recognizes the value of participation in interscholastic athletics and the role of [the TSSAA] in coordinating interscholastic athletic competition." 13 F. Supp. 2d at 675. The Executive Director of the Board stated that "[c]ompetitive athletics is a big part of the high school experience," and that the TSSAA "manages these activities as sanctioned by the State Board of Education." *Id.* at 681. "The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other." *Id.* at 684, TSSAA Constitution, Art. 1, Section 2.

Now, in this litigation, the TSSAA suddenly asserts that the public function test cannot be met because the function in question is sports, not education. "[W]hile it is an activity that may be enjoyable and sometimes valuable, it is *not* an integral

part of the public education governed by the state." Brief in Opposition at 16. In support of that position, the TSSAA makes such assertions as that there is no state statute requiring that the state provide interscholastic sports.[2] The TSSAA's argument that the regulation of interscholastic athletics is not state action because there are no state statutes governing interscholastic sports is illogical. The Board has chosen to sanction, sponsor and encourage interscholastic athletics. Significantly, it grants academic credit for participation therein. 13 F. Supp. 2d at 684, Tenn. Bd. of Ed. Rule 0520-1-3-.06.

Indeed, if there were no TSSAA, supervision of interscholastic athletics would be performed by the Board itself. Under that scenario, it would be obvious that the regulation of high school sports is within the public function of education, and is state action.

The public function that must be focused on is *education*. It is a "red herring" to say that the function in question is high school sports, and that this is not a public function. The TSSAA and the Board must be hoisted by the petard of their own public statements and, indeed, the TSSAA's own Constitution.

ii. Education is a Public Function.

The right to an education, and the duty of the State to provide it, are embodied in the Tennessee Constitution. Tenn. Const. Art. XI, Section 12.

The Tennessee Supreme Court in *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993)

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2. The Tennessee Code does not say that the schools must offer chemistry, either. However, the Board's rules require that science be part of the high school curriculum. No one would argue that teaching chemistry or any other purely academic subject is a separate function from the public function of education, *per se*. Having chosen to offer these academic subjects, the Board could not enact a rule that girls could not enroll for those subjects, or that they could only enroll for the introductory courses while boys could also enroll for the advanced courses.

recognized this right and held that funding for school districts across the state must be fairly distributed. After describing the pitiful state of education in some areas of Tennessee, and the effect upon students who live in the poorer school districts, *id.* at 143-145, the Tennessee Supreme Court held that local control over education is not a "rational basis" to sustain funding and educational discrepancies among school districts. *Id.* at 156. The state cannot absolve itself from its duty to educate its children by devolving that duty upon the localities, even though localities are certainly actively involved. If the educational function cannot be delegated to a locality, which is obviously a governmental entity, how could it be delegated to the TSSAA without the TSSAA's being a state actor?

The Board has adopted Tenn. Bd. of Ed. Rule 0520-7-2-.03(6)(c)9(i)(I), which mandates essentially that health and physical education be taught by every accredited private school under its aegis. *A fortiori*, this is required of public school education. *See* Tenn. Bd. of Ed. Rules 0520-6-10-.01, *et seq.*

Employees of TSSAA, including Respondent Carter, are covered by the State retirement system and, by statute, are included in the definition of "teachers" for that purpose. Tenn. Code Ann. § 8-35-118. 13 F. Supp. 2d at 684.

Certainly, no one will be killed or maimed as a result of the choice that the TSSAA blithely says is available — resigning from the TSSAA. That choice might be available in a hypothetical sense. But it is not realistic. Member schools should not be forced to make such a choice. There is no guarantee that a private school athletic association would be formed, that such an association would be viable with so few schools as members, or that there would be any cooperation or coordination between the two associations or among the schools. It cannot be assumed that a system of separate associations would allow private schools to compete against public schools at all, or to compete for championships. In effect, private schools and their students would be cut off from intercourse with the cross section of other

schools and other people that is so vital to young people in the formative years. As noted above, it is the students that suffer the consequences of these choices — made, of course, by adults — that look perfectly viable on paper but would be devastating in real life.

This Court in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), a commercial case, observed as follows:

> And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of Marsh which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. [Footnote omitted.] We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.

Id. at 163-164. TLAW asks the Court to take this opportunity to rule unequivocally that education is unequivocally a public function.

Alternatively, this Court should defer to the Tennessee Supreme Court's holding in *McWherter, supra*, and acknowledge that education is a public function under Tennessee law.

VI.

UNITED STATES v. VIRGINIA SUPPORTS THE POSITION THAT THE TSSAA IS A STATE ACTOR.

TLAW asserts that *United States v. Virginia*, 518 U.S. 515 (1996) (hereinafter, the "VMI case") is relevant to an understanding of the present case, even if this relevance is not apparent at first blush. The Court held that the Commonwealth of Virginia must make available to "her daughters" the same opportunity that it had made available since 1839 to "her sons," that is, the opportunity to be educated under the unique adversative system of the Virginia Military Institute. The Court compared a separate, women-only quasi-military program called the Virginia Women's Institute for Leadership ("VWIL") that the Commonwealth had set up in partnership with Mary Baldwin College, located not far from VMI. This had been devised in an effort to comply with earlier rulings that the Commonwealth had to make available to women an education comparable to that available to men at VMI, while preserving the traditional single-sex education that has proven to be beneficial to some men and some women. The Court compared the features of the facility, the system, and the education at VMI with those of the VWIL. It found that the VWIL was but a pale substitute for VMI, and did not pass constitutional muster. One factor that the Court mentioned was the superior athletic facilities at VMI. *Id.* at 552.

A. If a Service is Provided, It Must Be Provided Fairly to All.

It has been argued in the instant case that high school athletics are not a public function because there is no constitutional right to engage in sports, and there is no statutory duty to provide a sports program, *per se*. *Brentwood Academy*, 180 F.3d at 763, Brief in Opposition at 11. Similarly, it was pointed out in the VMI Case that there is no constitutional right to the adversative system under which VMI operated, nor was the Commonwealth of Virginia required to have a school that

operated under the adversative system. But, since the Commonwealth of Virginia did, in fact — as it was free to do — provide such a system to males, at a prestigious facility with an excellent faculty and a wide variety of educational opportunities, then the Commonwealth could not deny to females a comparable opportunity. *Id.* at 555. This principle applies to the governance of sports by the Board and the TSSAA.

B. Schools and Students Should Not Be Deprived of a Viable Choice.

It has been argued in the instant case that because the TSSAA is voluntary, a dissenting school can simply withdraw from the Association if it does not like its rules. Of course, if this happened, the students at that school would have no opportunity whatsoever to participate in a full program of interscholastic sports. They would have no chance to become state champions at any sport. There would be fewer schools that they could play. They might have to travel much farther in order to play whatever schools they could play.

This dilemma was answered by this Court in the VMI Case. In reality, if women could not attend VMI, they " 'have no opportunity anywhere to gain the benefits of [the system of education at VMI].' " *Id.* at 523. Under the VMI ruling, women should not have to be either relegated to the program under the VWIL, or have no program at all. They were entitled to a program equivalent to that which men could obtain at VMI.

Likewise, Tennessee high school students, be they women students or private school students, should not be deprived of the possibility of playing interscholastic sports because the TSSAA imposes arbitrary or punitive rules.

C. The Court Should Examine the Actual Facts and Not Those Articulated in Response to, or in Anticipation of, Litigation.

Virginia argued that its basis for keeping VMI all male was to provide educational diversity. *See id.* at 525, 534-535. This rationale was articulated after the fact; it had never really been why VMI was all male. As was pointed out in the concurring opinion, diversity was not even articulated as a reason to remain all male when a study was commissioned in the wake of *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). This Court in the VMI Case held that it must look at the real reason for imposing a requirement, and not merely the reason that is articulated. *Id.* at 535-536.

Likewise, it is not enough for this Court in this case to consider the naked fact that the Board amended its rule in 1995. As TLAW has previously contended, this Court should not defer to the contrived 1995 change of the Board's rule, promulgated in anticipation of litigation. As the Court stated in the VMI Case, "the justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 516.

VII.

THE TSSAA MUST BE HELD TO BE A STATE ACTOR IN ORDER TO ASSURE THAT WOMEN STUDENTS WILL BE AFFORDED THEIR CONSTITUTIONAL RIGHTS.

A. The TSSAA's Action Against a School is in Reality a Punishment of the Students.

The TSSAA governs high school sports. It can require schools, i.e., coaches, students, and school administrators, to do and not to do certain things. It can punish them if they disobey.

Brentwood Academy, or any school, public or private, may be a legal entity, and it may be bricks and mortar and turf and bleachers and goalposts, but its raison d'être is to provide an education and protect the interests of its students. A school does not exist as an end unto itself, but to serve the students and the community.

Athletics must be looked at in that context. Excellence in athletics is not the only kind of excellence to which schools and students aspire. All schools want to turn out National Merit Scholars, science fair winners, Model UN participants, and Quiz Bowl, Latin and debate champions. All these are educational functions, even though a student has no constitutional right to participate in any particular one of these activities.

In reality, it is the students who are harmed by TSSAA's imposition of sanctions or unconstitutional rules. *See* the District Court's discussion at 13 F. Supp. 2d at 691. The harm to the schools represents harm to the students and prospective students for whom the school exists.

The District Court pointed out, *id.* at 693, that the TSSAA possesses unbridled discretion to penalize those expressing points of view with which it disagrees. The challenged limitations upon communication can be applied to both public school students and private school students.

TLAW agrees with Brentwood Academy's concern that children are being looked at as creatures of the state. *See* Petition for Writ of Certiorari at 11-14.

Cavalierly, the TSSAA says at page 16 of its Brief in Opposition that a school is free to withdraw from the TSSAA. If that happens, it is of course the students who are ultimately hurt; the students who are deprived of this beneficial aspect of their educations and of their preparation for life; the students who will be deprived of the opportunity to play varsity college sports. It is also fair to say that losing the opportunity to play against a variety of teams, including teams from private schools, is detrimental to public school athletes.

TLAW does not take a position as to what kind of school is "best," but contends that there should be a diverse educational system. A prospective student should have as many choices as possible. By definition, most students simply attend the public school, good or bad, large or small, rural or urban, for which they are zoned. But some inner-city students may have the opportunity, for whatever reason, to attend a private school. Some wealthy students will have the opportunity to attend a private school. Some public school students will have the opportunity to attend a special public "magnet" school. Therefore, public and private schools and their students should not artificially be separated from one another. The students who attend them should interact, whether at science fairs, debate tournaments, mock trials or, yes, athletic events. This is worthwhile and should not be withheld because of the hubris of the adults and the governmental bodies who are in charge.

B. Participation in Athletics is Beneficial on Many Levels for Young Women, and the Court Must Be Vigilant to Protect Their Rights to Access In General.

Many court decisions have addressed the need to protect women's access to athletics. TLAW will not discuss the numerous studies and other evidence supporting the importance and benefit to young women of participating in sports, for their characters, their physical and emotional well-being, and their future educational and career opportunities, among others. This subject has been addressed thoroughly and skillfully in the brief of *amicus curiae* the National Women's Law Center.

See also United States v. Virginia, 518 U.S. 515 (1996), which discussed the intangible benefits to young women of certain kinds of extracurricular activity and training, and held that these should be made available to young women as well as to young men.

Additionally, by enacting Title IX, Congress enunciated that it is the public policy of this nation that women shall be treated fairly in their access to athletic opportunities. Congress

went as far as it could go in requiring sports programs at facilities which receive federal money, to assure women this access. TLAW will also not cite to the evidence that discrimination against female athletes lingers. TLAW again refers the Court to the brief of *amicus curiae* the National Women's Law Center.

C. The Court Must Be Vigilant to Protect Women Athletes from the Actions of the TSSAA, in Particular.

TLAW emphasizes that the TSSAA's history of arbitrary and even punitive action is well established. TLAW respectfully begs this Court not to consider this case in a vacuum, but rather to be cognizant of the TSSAA's pattern of behavior.

In *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990), a student with a learning disability transferred to McGavock High School, a public school in Nashville, and wanted to play football. The District Court ordered that he be allowed to play. The TSSAA had to be enjoined from stripping the school of its wins and trophies for complying with the court order. It is interesting to note that, after the litigation was concluded, the student lost his case, and the only remnant of the original case that still stood was the ruling that the TSSAA could not strip McGavock of its wins and trophies. *Crocker v. TSSAA*, 47 F.3d 1168 (Table), 1995 WL 14108 (6th Cir. 1995).

In *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, 293 F. Supp. 485 (M.D. Tenn. 1968), the TSSAA was held to have denied an all-black school its due process rights by suspending it for a year without setting preexisting standards and without a formal charge.

In *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) and *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976), the courts addressed the TSSAA's requirement that girls play basketball under different rules from boys, which allegedly made it impossible for girls in Tennessee to qualify for college basketball scholarships. *Cape* pointed out, 563 F.2d at 794-795, that Tennessee was one of the last five states to require women to play under the old rules.

In the VMI Case, *supra*, the Court analyzed its gender-discrimination cases and the evolution of the "intermediate scrutiny" standard, 518 U.S. at 531-533. Whether or not one agrees with the specific ruling in the case, which led to women's being admitted to VMI, and whether or not a new "exceedingly persuasive justification" test is applied to cases of gender discrimination, the current standard is certainly at least an "intermediate scrutiny" standard. *See* dissenting opinion, *id.* at 566-603.

The most likely forms of discrimination to occur if the TSSAA is not held to be a state actor will be gender and racial discrimination, or at least discrimination that unfairly burdens and discriminates against female athletes. TLAW respectfully asserts that this Court should be conscious of this and vigilant to protect against this outcome.

It would defy logic for the TSSAA to succeed in evading constitutional consequences because of mere semantics, when the TSSAA's conduct, and its relationship to the Board, are so very similar to those described in the numerous cases finding that state athletic associations were state actors. If this Court affirms the Sixth Circuit, then, since other states surely have clever people watching this case, the progress that has been made will begin eroding before the ink is dry on this Court's opinion.

If there is no disincentive to their doing so, the Board and the TSSAA are entirely likely, based on their past conduct, to engage in an endemic pattern of unconstitutional discrimination and denial of women's and other athletes' equal protection and other constitutional rights that are guaranteed to them as part of their right to an education and the state's duty to educate them.

What the TSSAA is really trying to protect is the interests of public schools in students' not attending private schools — public/private school rivalry, as it were. This is clear from the Sixth Circuit's opinion, which opens with observations about Brentwood Academy's athletic prowess. 180 F.3d at 760. TLAW

takes no position on whether public or private schools are inherently better. However, what education is about is the good of the student, and the ultimate good of society derived from having the best-educated, best-prepared population that there can possibly be. One's instinct would tell one that this is accomplished by having a diverse educational system, and to have every school provide the best education possible. No school or group of schools should be treated as if it had some sort of proprietary rights in Tennessee students.

Thus, the bodies that govern the educational system, or entire facets of the educational system, must be held accountable. These bodies exist to serve the public. They must, therefore, be held to be state actors. They must be required to provide students the constitutional rights to which they are entitled. If the Tennessee Board of Education and the TSSAA are allowed to set policy and impose penalties as they have done here, and as they did in the *Crocker*, *Cape, Kelley* and *Carnes* cases, *supra*, then our children, their families, and, ultimately, society, will suffer.

The Sixth Circuit's decision is purely and simply a wrong decision. It cannot be distinguished from the Sixth Circuit's earlier decisions. It cannot be distinguished because statements in earlier opinions are said to have been dictum, in cases which could not have been decided as they were without the premise that the TSSAA is a state actor. It cannot be upheld on the ground that the Tennessee Board of Education "repealed" the rule that the TSSAA was "designated" the governing body, without looking at what replaced the former rule. The Sixth Circuit's decision cannot be distinguished from the rulings in other circuits. In short, the Sixth Circuit decision does not withstand either a proper legal analysis or the test of common sense.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Tennessee Lawyers' Association for Women respectfully requests that this Court hold that education is a public function generally or, alternatively, under Tennessee law; that this Court hold that the Tennessee Secondary Schools Athletic Association is a state actor and that its actions governing high school-athletics in Tennessee are state action; and that this Court reverse the decision of the Sixth Circuit Court of Appeals and reinstate the ruling of the U. S. District Court for the Middle District of Tennessee.

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APPENDIX

APPENDIX — RULES INVOLVED

RULES
OF
THE STATE BOARD OF EDUCATION

CHAPTER 0520-7-1
ADMINISTRATIVE RULES—
NON-PUBLIC SCHOOLS

TABLE OF CONTENTS

0520-7-1-.01	Creation of the Advisory council for Non-Public Schools	0520-7-1-.02	Repository for Permanent Records
		0510-7-3-.03 [sic]	Student Transfers

0520-7-1-.01 CREATION OF THE ADVISORY COUNCIL FOR NON-PUBLIC SCHOOLS.

(1) The Commissioner of Education shall appoint a nine member Advisory Council for Non-Public schools to advise the Department of Education on policies relating to non-public school administration.

(2) The term of each council member shall be for three years and members may be re-appointed.

Authority: *T.C.A §§ 49-1-302.* ***Administrative History:*** *Original rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

0520-7-1-.02 REPOSITORY FOR PERMANENT RECORDS.

(1) Non-public schools which cease operation shall place their student academic and attendance records in the office of the appropriate school administrator as specified below:

(a) Schools which merge, consolidate, or undergo change of ownership shall deposit their records with the continuing school.

(b) Schools which are a part of a system, organization, franchise or a ministry of a local church or a group of churches shall deposit their records with the appropriate ongoing administrative office;

(c) Schools may deposit their records with another private school in the near vicinity; or

(d) Unless records are deposited in accordance with (a), (b), or (c) above, schools shall deposit their records with the local public school system where the non-public school was located.

(2) Non-public schools which cease operation shall notify the superintendent of the public school system and the State Department of Education.

(3) Non-public schools which cease operation shall publish the location of student records in local newspapers.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *Original rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

9520-7-1-.03 STUDENT TRANSFERS

(1) Students may transfer among public schools, or Category I, II or III non-public schools (for definition of categories, see Chapter 0520-7-2), without loss of credit for completed work. See Chapter 0520-1-3. The school which the student leaves must supply a properly certified transcript showing the student's record of attendance, achievement, and the units of credit earned. However, this rule shall not be construed as to supersede any contractual obligation of parents with the non-public school (e.g. withholding of grades until all tuition/fees are paid).

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *Original rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

CHAPTER 0520-7-2
NON-PUBLIC SCHOOL APPROVAL PROCESS

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0520-7-2-.01	Categories	0520-7-2-.05	Category IV: Exempted Schools
0520-7-2-.02	Category I: State Department of Education Approval	0520-7-2-.06	Category V: Acknowledged for Operation
0520-7-2-.03	Category II: Agency Approval		
0520-7-2-.04	Category III: Southern Association of Colleges and Schools		

0520-7-2-.01 CATEGORIES.

(1) There shall be five categories of non-public schools in Tennessee:

(a) Category I schools are those approved individually by the State Department of Education;

(b) Category II schools are those which belong to an agency whose accreditation process is approved by the State Board of Education;

(c) Category III schools are those which are members of the Southern Association of Colleges and Schools (SACS);

(d) Category IV schools are those schools which are "church related" and exempt from regulations according to T.C.A. 49-50-801;

(e) Category V schools include all other schools, except home schools, as defined in T.C.A. 49-6-3050.

Authority: *T.C.A. §§ 49-1-302 and 49-6-3001.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

0520-7-2-.02 CATEGORY I: STATE DEPARTMENT OF EDUCATION APPROVAL.

(1) A school may seek state approval by direct application to the State Department of Education. The criteria and procedures used in the evaluation of such schools are the same as for the public schools.

(2) Each school shall comply with the requirements of T.C.A. 49-6-3007 regarding the reporting of the names, ages, and addresses of all pupils in attendance to the superintendent of the public school system in which the school is located.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

0520-7-2-.03 CATEGORY II: AGENCY APPROVAL.

(1) The State Board of Education may approve the school approval procedures of non-public school accrediting agencies.

(2) Schools holding full accreditation status with an approved agency are approved by the State Department of Education.

(3) Home schools which may affiliate with an approved agency are not approvable under this category.

(4) Procedures for application as an Approved Non-Public School Accrediting Agency.

(a) An agency seeking approval shall apply to the State Department of Education and shall supply relevant information needed by the department.

(b) The State Department of Education shall review the application of the agency with respect to the criteria for approval and recommend to the State Board of Education that the application be approved or denied. The applicant agency may address the State Board of Education at the time its application is being considered.

(5) Period of Approval.

(a) The period of approval for a recognized agency shall be five years.

(b) An agency which fails to meet the minimum standards for agency approval will have its approval revoked.

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(6) Criteria for Approval of a Non-Public School Accrediting Agency.

(a) Scope of Operation of Agency. The agency shall:

1. Have a clearly written statement of its objectives.

2. Delineate the process by which it approves schools; and

3. Have at least five member schools, each with at least ten full-time students.

(b) Organization of agency. The agency shall:

1. Specify qualifications for professional personnel for the agency.

2. Employ at last one full time director or superintendent; and

3. Be permitted to regulate schools which are not fully approved.

(c) Agency Responsibilities. The agency shall:

1. Maintain written descriptions of the requirements for school accreditation, and of the levels or types of membership granted;

2. Re-evaluate approved schools annually;

3. Give advance publication of proposed changes in approval standards to schools. These changes must be approved in advance by the State Department of Education;

4. Advise schools or directly provide them with technical assistance to address deficiencies;

5. Publish approval policies and lists of approved schools;

6. Require schools to report on deficiencies which could affect approval status;

7. Have procedures for revocation of approval;

8. Provide a list of all courses taught and the grade levels at which they are taught at each school;

9. Publish and follow minimum standards using the following criteria (or, the agency may use the standards as set forth in the Rules, Regulations and Minimum Standards for the Governance of Public Schools in the State of Tennessee):

(i) Curriculum and Graduation.

(I) The program shall include (but not be limited to) the areas of reading, composition, speech, mathematics, social studies, science, art, music, health and physical education.

(II) Each school shall use print and nonprint materials, including textbooks, which are adequate to meet the needs of the instructional program. See Chapter 0520-1-3.

(III) Each student shall meet the same minimum requirements for graduation as students in public schools. The specific requirements are listed in Chapter 0520-1-3.

(ii) Inservice. Each school shall have a minimum of five days for inservice education per school year.

(iii) Teacher Licensure and Evaluation.

(I) Each agency shall submit its procedures for licensing teachers. If the agency does not use the Tennessee State Department of Education licensure system, it must use a comparable system based upon educational training.

(II) Each teacher or principal shall hold a valid teacher license or permit as defined by the agency covering the work assignment.

(III) Each agency shall develop procedures for evaluation of all professional school personnel.

(iv) Facilities.

(I) Each school shall comply with rules, regulations, and codes of the city, county, and state regarding planning of new buildings, alterations, and safety.

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(II) Each school shall observe all fire safety regulations and procedures promulgated by the Tennessee Fire Marshal's Office.

(III) Each school shall have classrooms, laboratories, and libraries which are sufficient in number, adequate in space, and so constructed and arranged as to be conducive to carrying on the assigned activities. Playgrounds and physical education facilities shall be well maintained, free from hazards, and large enough to permit an adequate program of physical education.

(v) Administrative Rules.

(I) Each school shall maintain an operating schedule that includes the minimum number of instructional days and hours required of public schools. See Chapter 0520-1-3.

(II) Each school which provides services to students certified as eligible students with disabilities shall meet all standards of the State Board of Education rule 0520-1-3-.09.

(III) A child entering first grade shall be no less than six years of age on or before September 30. Any child five years of age on or before September 30 may be enrolled in kindergarten.

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(IV) Each school shall develop and implement a written policy on promotion and retention. The written policy shall be communicated to students and parents.

(V) The maximum enrollments for an individual class shall be specified and shall not exceed state maximum class sizes for the same subject and grade level.

(VI) Each school shall maintain complete and accurate permanent records. A cumulative record for each student for all work through high school is required.

(VII) Each school shall evaluate records and report the needs and progress of its pupils.

(VIII) Each school shall provide a sufficient number of appropriately qualified administrators, librarians and guidance counselors for the student body served.

(IX) Each principal or headmaster shall comply with the requirement of T.C.A. 49-6-5001 that each child enrolled in school be vaccinated against disease.

(X) Each principal or headmaster shall comply with the requirements of T.C.A. 49-6-3007 regarding reporting the names, ages, and addresses of all pupils in attendance to the superintendent of the public school system in which the school is located.

(vi) Testing Program. At least once every school year, each school shall give a nationally standardized achievement test covering the areas of reading, language arts, spelling, math, science, and social science to each pupil in grades 2 through 8 and grad 10; the results must be communicated to teachers and parents and kept on file at the school for one calendar year.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

0520-7-2-.04 CATEGORY III: SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS.

Schools in this category are accredited by the Southern Association of Colleges and Schools according to the procedures established by the association.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

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0520-7-2-.05 CATEGORY IV: EXEMPTED SCHOOLS.

(1) Schools in this category are exempt from regulation regarding faculty, textbooks, and curriculum. T.C.A. 49-50-801 defines a church related school as "a school operated by denominational, parochial or other bona fide church organizations, which are required to meet the standards of accreditation or membership of the Tennessee Association of Christian Schools, the Tennessee Association of Independent Schools, the Southern Association of Colleges and Schools, the Tennessee Association of Non-Public Academic Schools, or a school affiliated with Accelerated Christian Education, Inc." Exempt schools are not state approved unless they voluntarily request to be associated with a non-public school accrediting agency, seek full state approval, or approval from the Southern Association of Colleges and Schools (SACS).

(2) Each school shall:

(a) Comply with all rules and regulations and codes of the city, county, and state regarding planning of new buildings, alterations, and safety.

(b) Comply with all rules and regulations of Tennessee Department of Health and Environment regarding construction, maintenance, and operation of the school plant.

(c) Serve all fire safety regulations and procedures promulgated by the Tennessee Fire Marshal's Office.

(d) Comply with the requirements of T.C.A. 49-6-5001 that each child enrolled in school be vaccinated against disease.

(e) Comply with the requirement of T.C.A. 49-6-3007 that the names, ages, and addresses of all pupils in attendance be reported to the superintendent of the public school system in which the school is located.

Authority: *T.C.A. §§ 49-1-302 and 49-50-801.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

0520-7-2-.06 CATEGORY V: ACKNOWLEDGED FOR OPERATION.

(1) Schools in this category are those which are not category I, II, III or IV schools. Schools in this category shall not include home schools.

(2) Each school seeking acknowledgment for operation shall furnish to the State Department of Education the following information by November 1st of each year:

(a) Name, mailing address and telephone number of the school;

(b) Name and academic credentials of the principal or headmaster of the school;

(c) Number of students in each grade level as of October 1 of current school year;

(d) Name and academic credentials of each teacher and the subjects taught by that teacher;

(e) Certification that the school year provides an operating schedule that includes the minimum number of instructional days and hours as required of public schools. See Chapter 0520-1-3.

(3) Each school shall keep on file the curriculum offered and shall make copies available for inspection by the State Department of Education and the public upon request.

(4) Each school shall have facilities and fixed equipment which conform to the safety and health requirements of city, county, or state agencies.

(5) Each school shall comply with all rules and regulations and codes of the city, county, and state regarding planning of new buildings, alterations and safety.

(6) Each school shall comply with all rules and regulations of the Tennessee Department of Health regarding construction, maintenance and operation of the school plant.

(7) Each school shall observe all fire safety regulations and procedures promulgated by the Tennessee Fire Marshal's Office.

(8) Each school shall comply with the requirement of T.C.A. 49-6-5001 that each child in the school be vaccinated against disease.

(9) Each school shall comply with the requirement of T.C.A. 49-6-3007 that the names, ages, and addresses of all pupils in attendance be reported to the public school system in which the school is located.

(10) Each teacher shall possess at least baccalaureate degree, of which no more than twenty-five percent of course hours shall have been taken through home study or correspondence.

(11) Each school shall administer a nationally standardized achievement test covering the basic academic areas of grades 2 through 8 and grade 10. Results of the test shall be used to improve the instruction of the students.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

No. 99-901

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BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER,
Executive Director and Individually,
Respondents.

On Writ of Certiorari to The United States Court of Appeals For the Sixth Circuit

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BRIEF OF NATIONAL WOMEN'S LAW CENTER, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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NATIONAL COALITION FOR SEX EQUITY IN EDUCATION

NATIONAL COUNCIL OF JEWISH WOMEN

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WOMEN EMPLOYED

WOMEN'S LAW PROJECT

WOMEN'S SPORTS FOUNDATION

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INTEREST OF *AMICI CURIAE*

Amici curiae are organizations dedicated to the achievement of equality of opportunity for all students without discrimination based on gender, race, national origin, or disability.[1] All of the *amici* have a strong interest in ensuring that the Equal Protection Clause of the Fourteenth Amendment to the Constitution, which mandates that no State shall "deny to any persons within its jurisdiction the equal protection of the laws," is accurately interpreted and applied to high school athletic associations. Statements of interest of the *amici* are set forth in Appendix A.

SUMMARY OF ARGUMENT

1. This case involves a state athletic association's attempt to distance itself from the State, despite the extremely close nexus between the association and the State's public schools and Board of Education, through which the association governs every aspect of interscholastic athletics in the State. By so doing, the athletic association attempts to escape its obligations under the Constitution, including its non-discrimination obligations under the Equal Protection Clause. The question presented requires the Court to decide whether the conduct of the Tennessee Secondary School Athletic Association ("TSSAA" or "Association"), the organization designated by the State to govern interscholastic athletics and consisting entirely of secondary schools located in the State of Tennessee, the majority of which are public, is fairly

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

attributed to the State of Tennessee and thus constitutes "state action."

In *National Collegiate Athletic Ass'n v. Tarkanian*, this Court indicated that state athletic associations whose memberships consist entirely of institutions located within the same state, many of them public institutions, should be considered state actors. 488 U.S. 179, 194 n.13 (1988). By way of explanation, the Court cited with approval two circuit court opinions holding two state high school athletic associations to be state actors: *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), and *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968). Indeed, the vast majority of circuit courts to consider the issue similarly have concluded that state athletic associations such as the TSSAA are state actors based on a variety of factors – factors that exist in this case and that demonstrate a close and intertwined relationship between the athletic association and the State.

As is generally true of state athletic associations, the TSSAA's membership consists mostly of public schools located within the State; its leadership is comprised of public school officials and employees; TSSAA rules and policies are binding on all schools unless they withdraw from the TSSAA; local school districts are primarily responsible for enforcing the TSSAA rules and policies; and its funding comes largely from public school events that are held at state-owned public school facilities. Moreover, Tennessee's State Board of Education has designated the TSSAA as the organization to govern interscholastic athletics in the state. Because of this uniquely close and intertwined relationship between the TSSAA and the State, the actions of the TSSAA are "fairly attributable to the State" and, thus, the TSSAA is a state actor.

2. While in this case the state actor issue arises in the context of a First Amendment challenge, recognizing that state athletic associations are state actors is important to ensuring that high school students are provided equal protection of the laws in interscholastic athletics programs. The Equal Protection Clause of the Fourteenth Amendment to the Constitution mandates that "no State shall 'deny to any persons within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 489 (1985). Unfortunately, the promise of equal protection has yet to be fully realized with respect to female students' opportunities to participate in athletics.

The importance of equality in athletics to the educational achievement, psychological and physical health, and professional opportunities of women and minorities is well documented. Notwithstanding these benefits, discrimination in interscholastic athletics still persists. By recognizing that state athletic associations are state actors, state athletic associations will be held accountable for the rules which govern interscholastic athletics, and thus will not be able to insulate themselves from their non-discrimination obligations, including those contained in the Equal Protection Clause.

ARGUMENT

I. THE TSSAA IS A STATE ACTOR

A. This Court's Criteria for State Action Center on Whether a Party's Actions Are "Fairly Attributable to the State"

The Court has set forth various tests to determine whether a party's challenged conduct should be considered state action: (1) the public function test, which requires that the private entity exercise powers that are traditionally exclusively reserved to the State, such as holding elections, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-64 (1978); (2) the state compulsion test, which requires that a state exercise such coercive power or provide such significant encouragement, either covert or overt, that in law the choice of the private actor must be deemed to be that of the State, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); (3) the symbiotic relationship or nexus test, which requires that there be a sufficiently close nexus between the State and the challenged action of the private party so that the action of the latter may be fairly treated as that of the State itself, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961); and (4) the joint action test, which requires that the private party be willfully and jointly engaged with the State or its agents in the challenged action, *Adickes v. H. Kress & Co.*, 398 U.S. 144, 152 (1970). *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The Court itself, however, has questioned whether "these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court" in cases raising the issue of when particular conduct may be deemed state action. *Id.* As this Court has stated, these tests essentially stand for the

proposition that a private party's actions constitute "state action" when the party's actions may be "fairly attributable to the State." *Id.* at 937.

As discussed *infra*, the TSSAA's actions are fairly attributable to the State because there is a sufficiently close nexus between the Association and the State of Tennessee. The Association's extremely close nexus to the State is revealed primarily by the fact that the overwhelming majority of its members are public schools that actively participate in the governance of the Association, and additionally by virtue of the State Board of Education's designating TSSAA as the organization to govern interscholastic athletics in the state.

B. This Court's Decision in *National Collegiate Athletic Ass'n v. Tarkanian* Indicates That A State High School Athletic Association Is a State Actor By Virtue of Its Membership and Governance Structure

This Court in *National Collegiate Athletic Ass'n v. Tarkanian* indicated that state high school athletic associations are state actors because of the influence exerted over them by their members, which are predominantly public schools of one particular state. 488 U.S. at 194 n.13. In that case, Tarkanian, a university basketball coach at the University of Nevada, Las Vegas (UNLV), claimed that the NCAA had violated his Fourteenth Amendment due process rights when it recommended that he be disciplined for certain NCAA rule violations. The main issue before the Court was whether UNLV, undoubtedly a state actor, and the NCAA, a nationwide private association of about 1,200 private and public colleges and universities that governs its members' intercollegiate athletics programs, acted jointly to deprive Tarkanian of his rights, thereby transforming the NCAA into

a state actor. *See Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 741-42 (W.D. Mich. 2000) (analyzing *Tarkanian*).

Before reaching this question, however, the Court examined the relationship between UNLV and the NCAA to decide whether UNLV exercised enough control over the NCAA such that the NCAA's conduct in general could be attributed to the State of Nevada. The Court held that the NCAA was not a state actor because the source of the NCAA's legislation is not any one state, but rather its collective membership of public and private colleges and universities from many different states, speaking through an organization that is independent of any particular state. *Tarkanian,* 488 U.S. at 193. The Court made a point of noting, however, that state high school athletic associations would fare differently under this analysis: "The situation would, of course, be different if the membership [of the athletic association] consisted entirely of institutions located within the same state, many of them public institutions created by the same sovereign." *Id.* at 194 n.13.

Footnote 13 in *Tarkanian* provides the framework for analyzing the instant case. The membership of the TSSAA, as is generally true for high school athletic associations throughout the nation, consists entirely of schools located within the same state and the majority of its members are public schools created by the State. *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 673 (M.D. Tenn. 1998) ("[The TSSAA] is composed of 290 public schools and 55 independent and parochial schools."), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *reh'g en banc denied*, 190 F.3d 705 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 1156 (2000). Like the NCAA, the source of the TSSAA's authority is its collective membership, but unlike the NCAA,

all TSSAA members are secondary schools in one state, with the overwhelming majority of them being public schools.

Moreover, in distinguishing state high school athletic associations, the Court in *Tarkanian* cited with approval *Clark v. Arizona Interscholastic Ass'n,* and *Louisiana High School Athletic Ass'n v. St. Augustine High School,* both of which held high school athletic associations to be state actors based on their close nexus to their respective states. 488 U.S. at 194 n. 13. Other circuit courts similarly have held that high school interscholastic athletic associations are state actors. *See Moreland v. Western Pennsylvania Interscholastic Athletic League,* 572 F.2d 121, 125 (3rd Cir. 1978); *Griffin High Sch. v. Illinois High Sch. Athletic Ass'n,* 822 F.2d 671, 674 (7th Cir. 1987); *In Re: United States, ex rel. Missouri State High Sch. Activities Ass'n,* 682 F.2d 147, 151 (8th Cir. 1982); *Oklahoma High Sch. Athletic Ass'n v. Bray,* 321 F.2d 269, 273 (10th Cir. 1963).[2]

The Fifth Circuit in *St. Augustine* and the Ninth Circuit in *Clark* considered numerous factors that demonstrated the extremely close nexus between each high school athletic

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[2] Respondents' contention that only cases decided after the "*Blum* trilogy" are relevant to deciding whether high school athletic associations are state actors fundamentally misunderstands this Court's longstanding criteria for state action. Respondents' Brief in Opposition 6-9. The Court's decisions in *Blum v. Yaretsky*, *Lugar v. Edmonson Oil Co.*, and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), the "*Blum* trilogy," did not articulate new tests for state action. Rather, the Court merely clarified and applied its precedents in deciding whether the private party in each case was a state actor. *See, e.g., Barnes v. Lehman*, 861 F.2d 1383, 1386 (5th Cir. 1988) (noting that *Blum* trilogy applied "the existing incantations [of the state action test] to varying facts"). Thus, while some of the circuit court cases cited above were decided before *Blum,* the outcomes would not be different had they been decided after *Blum.*

association and its respective state and hence its status as a state actor: (1) The association's membership consisted primarily of public schools; (2) The association's leadership was composed of public school employees – state officers who were state-paid and state-supervised – who played a substantial role in determining and enforcing policies and regulations; (3) The association's funds came largely from public athletics events, the great majority of which were held at state-owned and state-supplied facilities; (4) Association employees were covered by the state retirement system; (5) The association exercised wide control over the scheduling, participation in and conduct of public schools' athletic events; (6) The association set and enforced eligibility rules and limited the number of games public schools could play; (7) The association had the power to keep public schools from competing against other schools; (8) The association had the power to investigate, discipline and punish member schools; and (9) The association's rules and regulations bound all public schools. *See Clark*, 695 F.2d at 1128, and *St. Augustine*, 396 F.2d at 227-28.

Almost identical factors are present in this case: (1) The TSSAA consists primarily of public schools and school districts; (2) The leadership of the TSSAA – namely, its Legislative Council and Board of Control – is made up entirely of high school principals, assistant principals, or qualified superintendents, and these state officials play a substantial role in determining and enforcing TSSAA rules and regulations; (3) The majority of TSSAA revenues are derived from membership fees paid by public schools and from gate receipts at public athletic events, the great majority of which are held at state-owned and state-supplied public school facilities; (4) The TSSAA's employees are covered by the state retirement system; (5) The TSSAA exercises wide control over the scheduling, participation in and conduct of public schools' athletic events; (6) The TSSAA sets the

seasons, limits the number of practices and contests between schools and determines and enforces all eligibility rules and contest regulations for interscholastic play; (7) The TSSAA governs which schools its member public schools can compete against; (8) The TSSAA investigates, disciplines and punishes member schools, and (9) TSSAA rules and regulations bind all public schools, although any school may withdraw from the association. *Brentwood*, 13 F. Supp. 2d. at 683-84. In addition, officials for athletic contests at the TSSAA member schools must register with the TSSAA and be selected from the Association's official list. The TSSAA also sets certain restrictions and requirements for its member schools' coaches, who for the most part are public employees, including requiring them to be a member of the regular teaching staff or to register with the TSSAA. The fact that the TSSAA places initial responsibility for ensuring compliance with the Association's rules and regulations upon the principals of the member schools merely highlights the close nexus between the Association and the public school system. *Cf. Communities for Equity v. Michigan State High Sch. Athletic Ass'n*, 80 F. Supp. 2d at 739. All of these factors demonstrate the close nexus between the TSSAA and the State of Tennessee and hence lead to the conclusion that the Association's actions are fairly attributable to the State.[3]

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[3] In *Tarkanian*, after concluding that the NCAA was not a state actor by virtue of the nexus test, the Court went on to consider the alternative test of whether the NCAA's actions were fairly attributable to the State because it acted jointly with UNLV. In this case, the TSSAA satisfies the nexus test by virtue of its membership and governing structure, and hence all of its actions are state action; therefore, it is unnecessary to reach the issue of whether it is a state actor under the joint action test.

C. Tennessee's Designation of the TSSAA as the Organization to Govern Secondary School Athletics in the State Further Supports Its Status as a State Actor

The relationship between the TSSAA and Tennessee's State Board of Education ("the Board") further reveals the close nexus between the Association and the State. As the district court found in this case, the State Board of Education has recognized the functions of the TSSAA in governing interscholastic competition in the public school system since 1925. In fact, the State Board of Education issued a rule in 1972 that designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Brentwood*, 13 F. Supp. 2d at 680. Under the 1972 rule, the Chairman of the Board designated a person or persons to serve in an ex-officio capacity on the TSSAA Board of Control and Legislative Council. *Id.*

In April 1995, the Board changed its rule (apparently in response to litigation)[4] to state the following: "The State

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[4] The district court found that the 1995 change in the Board's rule appeared to be in response to two cases holding the TSSAA to be a state actor based in part on the wording of the 1972 rule, which designated TSSAA as the organization to govern interscholastic athletics in the State. *Brentwood*, 13 F. Supp. 2d at 681. The two cases discussed by the district court both involved claims of discrimination against the TSSAA. *See Crocker v. Tennessee Secondary Sch. Athletic Assoc.*, 735 F. Supp. 753 (M.D. Tenn. 1990), (disabled student claimed that TSSAA deprived him of rights secured by the Rehabilitation Act and the Education of the

Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." *Id.* at 681. Despite the cosmetic change in the language of the Board's rule, the relationship between the TSSAA and the State did not change in any way after 1995. The Board's new rule still names the TSSAA as the organization that governs interscholastic athletics in the state, and representatives of the state continued to participate in TSSAA meetings in their ex-officio capacities even after the rule change. In fact, the State Board of Education and the State Department of Education continue to be represented on TSSAA's Board of Control and its Legislative Council. Moreover, the formal change in the language of the Board's rule does not reflect any substantive change in even one of the factors demonstrating the intertwined relationship between the Association and the State, discussed above. *Id.* at 681-85. The TSSAA was, and is, a state actor based on its close nexus to the State, which is reflected by the State Board of Education's designating the TSSAA to govern interscholastic athletics in the state and the Board's participation in such governance.

The facts developed in this case overwhelmingly show that the TSSAA has a sufficiently close nexus to the public,

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Handicapped Act), *aff'd*, 908 F.2d 972 (6th Cir. 1990); *Graham v. Tennessee Secondary Sch. Athletic Assoc.*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995) (students claimed that TSSAA rule deprived them of due process and equal protection under the Fourteenth Amendment, *inter alia*).

state-controlled school system as well as a sufficiently intertwined relationship with the State Board of Education to make the Association a state actor. Therefore, the TSSAA cannot escape constitutional scrutiny by claiming to be a private organization and the State cannot avoid its constitutional obligations by claiming that it is not involved in the regulation of interscholastic athletics. As the Court found in *St. Augustine*:

> The factual context is not of the State's declining to act in an area which is then taken over by a private instrumentality. The State has not withdrawn from supervision and coordination of interscholastic activities as the Association contends. Instead, . . . interscholastic athletics is a program in which the State is actively and intensively involved, and "for the State to devote so much time, energy, and other resources to interscholastic athletics and then to refer coordination of those activities to a separate body cannot obscure the real and pervasive involvement of the State in the total program."

396 F. 2d at 228 (quoting district court decision).

II. RECOGNIZING STATE ATHLETIC ASSOCIATIONS AS STATE ACTORS IS IMPORTANT TO ENSURING THE GUARANTEE OF EQUAL PROTECTION

A. High School Athletic Associations, as State Actors, Must Not Deny Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the Constitution mandates that "no State shall 'deny to any persons within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne,* 473 U.S. at 489. The Court's decision in this case will have significant implications for ensuring that opportunities to participate in interscholastic athletics are provided equally without regard to sex, race or ethnicity. As discussed *infra*, equal opportunity to participate in athletics is extremely important to female and minority students due to the far-reaching educational, sociological, physiological and psychological benefits that result from sports participation.

The policies and practices adopted by state boards of education and public schools to govern interscholastic athletic programs must comply with the Equal Protection Clause. *E.g., Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (school could not prohibit girls from playing on a boys' tennis and cross country teams solely on basis of sex); *Hass v. South Bend Community Sch. Corp.*, 259 Ind. 515, 289 N.E.2d 495 (1972) (schools could not prohibit girls from playing on a boys' golf team solely on basis of sex). In order to promote coordinated and workable systems of state-wide interscholastic athletics, however, States typically designate athletic associations to set contest rules, determine eligibility restrictions, and promulgate uniform

policies and practices that govern nearly every aspect of interscholastic athletics throughout their states.

States should not be able to insulate themselves from their non-discrimination obligations, specifically those contained in the Equal Protection Clause, by trying to distance themselves from state athletic associations. Likewise, high school athletic associations, which for the reasons explained above are state actors, should not be allowed to escape their non-discrimination obligations.[5] Courts repeatedly have ensured that female and minority athletes receive an equal opportunity to participate in athletics by applying the Equal Protection Clause to state athletic associations. In *Brenden v. Indep. Sch. Dist. 742*, two Minnesota high school girls challenged as a violation of the Equal Protection Clause the state athletic association's

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[5] Students may also challenge certain discriminatory practices in interscholastic athletics of covered institutions pursuant to statutory rights contained in Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*; Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000 *et seq.*; and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 *et seq.* These statutory non-discrimination mandates do not supplant the protections provided by the Equal Protection Clause. In fact, these statutory rights and Constitutional rights differ in certain respects. For example, Title IX regulations explicitly exempt "contact sports" from certain non-discrimination requirements. Thus, a public school would not be forced to permit a girl to try out for the boys' basketball team under Title IX, even if the school fields no such team for girls. *See* 34 C.F.R. § 106.41(b). The female basketball player would be able to pursue a discrimination claim under the Equal Protection Clause, however. By way of further example, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982), this Court held that the University's women-only admission policy violated the Equal Protection Clause, even though the same claim was not allowed under Title IX, because Title IX explicitly exempts schools that "traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." 20 U.S.C. § 1681(a)(5).

rule prohibiting girls from participating on the boys' tennis and cross-country skiing and running teams, while the association's member schools provided no such teams for girls. The Eighth Circuit held that denying girls an opportunity to participate on a school non-contact sports team solely on the basis of sex was a denial of equal protection of the laws. In *Louisiana High School Athletic Ass'n v. St. Augustine High School*, African American high school students challenged the state athletic association's denial of membership to a high school that maintained a policy of admitting any qualified applicant regardless of race, but whose student body was completely African-American. The Fifth Circuit held that the athletic association violated the students' rights to equal protection by denying membership to a school because of the racial composition of its student body. In *Clark v. Arizona Interscholastic Ass'n*, Arizona high school students challenged a state athletic association rule prohibiting male students from playing on female interscholastic volleyball teams as a violation of the Equal Protection Clause. The Ninth Circuit upheld the athletic association's rule as a permissible means of promoting equality of athletic opportunity between the sexes, which was held to be a constitutionally sufficient justification for the sex-based treatment. Regardless of outcome, however, in all of these cases States were held accountable for the rules by which they govern interscholastic athletics, notwithstanding the States' efforts to distance themselves from the athletic associations, because the state athletic associations were found to be state actors.[6] As discussed

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[6] State athletic associations have made similar efforts to elude their non-discrimination obligations under various civil rights statutes, although this Court has not yet resolved this statutory coverage issue. *E.g., Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 629 (W.D. Mich. 2000) (Michigan High School Athletic Association defended lawsuit alleging discrimination on the basis of sex

below, sports participation is simply too important to the educational, physical, psychological and sociological well being of the nation's children and young adults to deny equality of opportunity to female and minority students.

B. Participating in Athletics Has Far-Reaching Benefits

Sports participation offers much to female and minority students. In 1997, the President's Council on Physical Fitness and Sport released a report on girls' involvement in physical activity and sports. The report confirmed that sports and physical activities are highly beneficial for girls, offering a wide range of educational, sociological, physiological, and psychological benefits. *See The President's Council on Physical Fitness and Sports Report: Physical Activity & Sports in the Lives of Girls* xi-xii (Spring 1997) [hereinafter *President's Council Report*]. Similarly, sports offer many of

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by claiming it was not covered by Title IX or the Equal Protection Clause). Likewise, the NCAA has made similar efforts to escape its non-discrimination obligations under Title IX, as well as other civil rights statutes, by claiming that it is neither a direct nor indirect recipient of federal funds. Contrary to both Petitioner's and Respondents' characterizations of this issue, this Court has explicitly left open the question of whether the NCAA is covered by Title IX, and by analogy Title VI, Section 504 and the Age Discrimination Act. *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999). Although the *Smith* Court rejected the lower court's ruling that the NCAA was covered by Title IX solely because it received dues from its members, which received federal funds, the Court explicitly left open two alternative theories of coverage, including the question of whether, "when a [federal fund] recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient." *Id.* at 469-70. Thus, by rejecting one theory of Title IX liability and at the same time leaving open other grounds for coverage, *Smith* gives the clear impression that the NCAA could well be covered.

these same benefits to minority students. *See* The Women's Sports Foundation, *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 4-5 (Aug. 15, 1989) [hereinafter *Minorities in Sports*].

First, athletic participation expands academic opportunities and promotes academic achievement. Studies show that student athletes generally have higher grade point averages, better attendance records, and fewer disciplinary problems. *See* National Federation of State High Schools, *The Case for High School Activities* (1999) [hereinafter *Case for High School Activities*]. On average, female athletes fare better academically than their non-athletic counterparts. *See President's Council Report* at xxiii. Young women who participate in sports have higher grades, higher scores on standardized tests, and are more likely to graduate from high school than non-athletes. *See President's Council Report* at xxiv. Athletic participation yields similar benefits for Black and Hispanic students. Minority athletes receive higher grades, are less likely to drop out, score higher on standardized tests, and aspire to hold leadership positions in their communities in greater percentages than their non-athletic counterparts. *See Minorities in Sports* 4-5; Carol Herwig, *Report Stresses Role of Academics; High School Athletes: Winners On, Off Field*, USA Today, Aug. 16, 1989, at 8D (citing *Minorities in Sports)* [hereinafter *Report Stresses Role of Academics*]. Similarly, Hispanic female athletes, especially from rural schools, are more likely than non-athletes not only to improve their academic standing while in high school, but also to graduate and to attend college following high school. *Minorities in Sports* 14.

In addition, the availability of athletic scholarships sharply increases young women's ability to pursue a college education and to choose from a wider range of schools, thus

opening more doors for women. Indeed, for many low-income women, intercollegiate athletics provides a gateway to an education that they otherwise could not obtain. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993), *aff'd in relevant part,* 101 F.3d 155 (1st Cir. 1996), *cert. denied,* 520 U.S. 1186 (1997). In order to develop the physical skills and obtain the necessary training to successfully obtain an athletic scholarship, however, participation in high school athletics is essential.

Second, sports offer students lifelong lessons, and playing high school sports is a predictor of later success in life. *See Case for High School Activities.* Female and minority athletes are more likely to aspire to hold leadership positions later in life than non-athletes. *See Minorities in Sports* 5; *Report Stresses Role of Academics*. In addition, female athletes develop a range of skills through participation in athletics, all of which are crucial to success in employment and adult life generally. Those skills include the ability to work on a team, to perform under pressure, to set goals, and to take constructive criticism. Participation in interscholastic athletics offers young women "an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Cohen*, 991 F.2d at 891. Importantly, participation in sports also can teach problem-solving skills. *See President's Council Report* 64.

Third, regular and rigorous physical exercise from sports provide enormous physical and mental health benefits to women and minorities. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. *See* Donna A. Lopiano, *Testimony Before the U.S. Subcomm. on Consumer Affairs, Foreign Commerce and Tourism*, Oct. 18, 1995. A 1998 study found that former college athletes had a 35% less chance of developing breast cancer and a 61% less

chance of developing reproductive cancer compared to non-athletes. *See* Carol Krucoff, *Exercise and Breast Cancer,* Saturday Evening Post, Nov. 1995, at 22. Increased fitness levels can contribute to better posture, the reduction of back pain, and the development of physical strength and flexibility. *See President's Council Report* 14. Significantly, if a girl does not participate in sports as a youth, she has a significantly reduced chance of engaging in physical activity as an adult. *See Minorities in Sports* 5 (former athletes were two to eight times more involved with sports during four years after high school than non-athletes).

In terms of emotional and mental health, women who participate in sports have a higher level of self-esteem, a lower incidence of depression, a more positive body image, and greater confidence and pride in their physical and social skills. *See* Debra L. Schultz, *Risk, Resiliency, and Resistance: Current Research on Adolescent Girls* (1991) (citing Colton and Gore, *Gender Differences in Stress and Coping Behaviors Among Late Adolescents).* Through participation in sports, women establish constructive relationships with peers, are influenced by healthy role models, experience success, and learn how to deal with physiological and psychological changes. *See President's Council Report* 64. The same correlation appears to be true for minority female athletes. *See Minorities in Sports* 7.

Sports participation also helps teenagers successfully cope with the physical and mental health challenges and risks associated with adolescence. Teenage female athletes are less than half as likely to get pregnant as female non-athletes (5% and 11%, respectively), more likely to report that they have never had sexual intercourse than female non-athletes (54 % and 41%, respectively), and are more likely to experience their first sexual intercourse later in adolescence than female non-athletes. *The Women's Sports Foundation*

Report: Sport and Teen Pregnancy 2-3 (May 1998). Significantly reduced rates of pregnancy result for African-American and Latina female athletes as well. *Id.* Physical activity appears to decrease the initiation of high-risk health behavior in adolescent girls. According to a 1995 survey of boys and girls ages twelve to sixteen, female adolescents engaging in high levels of leisure-time physical activity are significantly less likely to initiate cigarette smoking than those in moderate and low-leisure time activity groups. Deborah J. Aaron, et al., *Physical Activity and the Initiation of High-Risk Health Behaviors in Adolescents*, 27 Medicine and Science in Sports and Exercise 1639, 1642 (1995). Sports participation also offers teenage girls positive feelings about body image, improved self-esteem, increased self-confidence, and tangible experiences of competency and success. *See President's Council Report* 20-23, 25-26 & 28-30.[7]

Opportunities in athletics are important not only to the athlete, but also to the nation as a whole. When given opportunities, women have made tremendous contributions to the world of sports. Indeed, in 1996, female athletic contributions were acknowledged in the formation of the Women's National Basketball Association, where early reports indicated that viewing and attendance of games exceeded predictions of popularity and interest. *See* American Ass'n of Univ. Women Educ. Found., *Gender Gaps: Where Schools Still Fail Our Children* 78, (Oct. 14,

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[7] A recent book provides a comprehensive look at the impact of sports in the lives of girls and provides a guide for parents who would like to see their daughters succeed. The authors talked with female student-athletes, professional athletes, parents, educators, coaches, and academics. The authors propose that "in raising our athletic daughters, we are raising girls to be strong, self-determined women." Jean Zimmerman and Gil Reavill, *Raising Our Athletic Daughters* xii (1998).

1998) (citing G. Gross, *Girls Gleefully Claim a League of Their Own*, N.Y. Times, Aug. 4, 1997, at A1). And more recently, in July 1999, a record-setting 90,185 fans filled the Rose Bowl and another 40 million Americans watched on television as the United States' women's soccer team won the Women's World Cup. *See*, George Wahl, *Out of this World with the Cup on the Line, A Last-Second Hunch and a Clutch Left Foot Lifted the U.S. to a Breathtaking Victory over China*, Sports Illustrated, July 19, 1999, at 38.

Notwithstanding these tremendous accomplishments and contributions to sport, women and girls still continue to face barriers to equal athletic opportunities. According to the National Federation of State High School Associations, in the 1998-99 school year, female students constituted only 40% of all high school athletes (2.65 million girls, 3.83 million boys), even though total enrollment was approximately 50% female. National Federation of State High School Associations, *1999 High School Athletics Participation Survey*; U.S. Census Bureau, *Current Population Survey Report, Table 1: Enrollment Status of the Population 3 Years Old and Older* (October 1998). In the New York City public school system, for example, 155 of 165 high schools have some girls' sports programs, but 45 of them offer three or fewer sports for girls than for boys, and only about 18,000 of the system's 40,000 student-athletes are girls. Lena Williams, *Progress Is a Slow Train for Girls' Teams,* N.Y. Times, Jan. 14, 1999, at D7. Minority female athletes receive even fewer athletic opportunities. Physical Activity and Health: A Report of the Surgeon General 12, 14 (1996).[8]

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[8] The Surgeon General's Report indicates that nearly half of young people twelve to twenty-one years of age are not vigorously active; moreover, physical activity sharply declines during adolescence. Further, about 14% of young people report no recent vigorous or light-

While full equality of opportunity in athletic participation has yet to be realized, the guarantee of equal protection contained in the Fourteenth Amendment, along with the statutory non-discrimination requirements of Titles IX and VI, have played a vital role in opening up competitive athletics to female and minority student athletes. In order for this commitment to providing young women and minorities equal opportunities in athletics to be sustained, States and their athletic associations must not be permitted to evade their non-discrimination obligations.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the Sixth Circuit's judgment in this case.

Respectfully submitted,

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to-moderate physical activity. This indicator of inactivity is higher among females than males and among black females than white females. *Id.*

APPENDIX

APPENDIX
INTEREST OF THE AMICI

The National Women's Law Center ("Center") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX. In particular, the Center has consistently sought equal opportunities for women with respect to interscholastic and intercollegiate athletics, and was counsel in the first Title IX challenge to discrimination in intercollegiate athletics, *Haffer v. Temple University.* The benefits and opportunities uniquely available to competitive athletes have been and continue to be disproportionately reserved for men. The Center has a deep and abiding interest in assuring equal athletic opportunity, including the opportunity to participate in intercollegiate athletics.

The American Association of University Women (AAUW), an organization of 150,000 members, for well over a century, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues.

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center focusing on the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority

areas: Sex Discrimination, including sex discrimination in education; Women's Health and Reproductive Rights; Family Law; Violence Against Women; and Child Care.

Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination and access to equal opportunities in athletic programs and activities. The issues raised in this case will have an enormous impact on the rights of women and girls to participate fully in educational and athletic programs free of the terrible consequences of discrimination. Thus, this case raises questions within the expertise and concern of the California Women's Law Center; and the California Women's Law Center has the requisite interest and expertise to be heard by the Court in this appeal.

Clearinghouse on Women's Issues was established some 25 years ago to provide a channel for dissemination of information on a variety of issues of special concern to women. Advancement of educational opportunities for women and girls and elimination of discrimination in all areas of society are major issues to which we have given sustained attention.

The Connecticut Women's Education and Legal Fund (CWEALF) is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,000 individuals and organizations. CWEALF has supported a number of cases that promote gender equity in interscholastic athletics.

The Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is the nation's

premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

Girls Incorporated was founded as a national organization in 1945, with the mission of inspiring all girls to be strong, smart and bold. It has expressed its values through a Girls' Bill of Rights that focuses on girls' rights to develop skills for their own success and the community's benefits. For the past two decades, Girls Incorporated has also expressed its values and convictions in policy statements, which form the foundation of their programs and advocacy. Girls Incorporated develops and implements research-based programs that change the world for girls with whom they interact directly.

The National Association for Girls & Women in Sport (NAGWS) consists of professional educators who are committed to fostering quality and equality in sport for girls and women. As part of the American Alliance for Health, Physical Education, Recreation, and Dance, NAGWS operates to provide service to athletes, parents, teachers, coaches, administrators, officials, and researchers. For over 100 years, NAGWS has been addressing the needs of girls and women in sports at all levels of participation, and therefore is very concerned about the issue of whether high school athletic associations are considered to be "state actors."

The National Association for Women in Education (NAWE) is a national professional higher education association dedicated to providing support for women educators through programs, services, publications and advocacy. Founded in

1916, NAWE is one of the oldest and most respected organizations in higher education.

The National Coalition for Sex Equity in Education is an organization of educators and community activits across the United Stated (pre-school through postsecondary) and community activists working to assure equal opportunity in education based on gender.

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in the passage of Title IX and NCJW's *National Resolutions*, which support "the enactment and enforcement of laws and regulations which protect civil rights and individual liberties for all," we join this brief.

The National Partnership for Women & Families, founded in 1971, formerly the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the United States Supreme Court to advance women's opportunities in education.

The National Organization for Women Foundation (NOW) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. The NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a contributing membership of over 500,000 women and men in more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of the NOW Foundation has been to ensure equality and fair treatment for girls and women, particularly equal educational and athletic opportunities in school, and we have advanced legislation and engaged in litigation to that end. Gender equity in interscholastic athletics is important to girls and these programs must be subject to the nondiscrimination requirements of the Constitution.

The NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, including sex discrimination in interscholastic and intercollegiate athletic programs. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs and joins this case because of its importance to securing equal opportunity in education.

The Northwest Women's Law Center is a nonprofit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the

provision of legal information and referral services. Founded in 1978, the NWLC has been, *inter alia*, dedicated to challenging barriers to sexual equality in education with a focus on eradicating gender discrimination through the enforcement of Title IX, the Constitution, and other antidiscrimination laws. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women and girls at all educational levels have equal access to educational opportunities. The NWLC is currently litigating several gender equity cases throughout the region that seek to ensure that girls receive equal educational and athletic opportunities, as well as participating with numerous national groups on cases currently before the United States Supreme Court and several federal courts. The NWLC is also working directly with numerous school districts and parent groups to monitor and enforce compliance with these mandates. The NWLC continues to serve as a regional expert and leading advocate on Title IX and gender equity.

Parents for Title IX is a national organization supporting families and others who are helping children achieve gender equity in schools. There is a serious pervasive problem of non-compliance by schools from coast to coast, and it is shameful for schools to continually and deliberately ignore Title IX and other nondiscrimination mandates. We support this effort to achieve equality.

The People for the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, equal opportunity and liberty, People For now has over 300,000 members nationwide. People For has represented parties and amici in litigation

before this Court implicating the ability of individuals and groups to vindicate fundamental constitutional and civil rights, including the ability to secure free speech, as well as nondiscrimination, equal protection guarantees against institutions that operate as state actors.

SportsBridge's mission is to empower girls through sports and leadership. Currently, SportsBridge serves multicultural girls, age 11 to 18, who live and attend middle and high schools in under-resourced communities in the San Francisco Bay Area. We promote sports as a vehicle for youth development because playing sports promises short and long-term outcomes that have the potential to exponentially improve girls' lives. SportsBridge strongly supports holding high school athletic associations subject to nondiscrimination mandates.

The Tennessee Lawyers' Association for Women ("TLAW") is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. TLAW is concerned that women and minorities will be foreclosed from challenging actions and decisions of the Tennessee Secondary Schools Athletic Association ("TSSAA") on constitutional grounds.

The Title IX Advocacy Project ("the Project") is a youth empowerment and educational/legal advocacy organization that was founded in September 1994 to work with young people and their adult allies to promote gender equity in low-income middle schools and high schools in greater Boston. Currently, the Project focuses on eliminating 1) sexual harassment in school, 2) discrimination against pregnant and parenting students, and 3) gender inequity in school-based athletics programs, all of which violate Title IX, the Constitution, and other nondiscrimination mandates. The Project facilitates workshops at schools, community centers,

and conferences; sponsors peer education programs; provides education and assistance to young people and their families; develops age-appropriate and culturally sensitive gender equity policies for schools; and creates and disseminates resource materials. Our programs provide a co-ed approach to education and empowerment, promote the development of leadership and organizing skills, build self-esteem, increase communication, empathy, understanding and respect between young women and young men, and help to ensure that girls and young women are not deprived of the educational opportunities necessary to fulfill their personal and professional dreams and aspirations.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm that specializes in precedent setting civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ has litigated numerous sex discrimination in education cases under the Equal Protection Clause, as well as under Title IX of the Education Amendments Act of 1972. These cases demonstrate TLPJ's longstanding commitment to advancing gender equity in athletics. TLPJ believes that to ensure gender equity in interscholastic athletics, it is critical that high school athletic associations be deemed "state actors" subject to the U.S. Constitution's prohibitions against discrimination.

Wider Opportunities for Women (WOW) is a national nonprofit women's employment organization with over three decades of experience helping women and girls achieve equality of opportunity in education and employment.

WOW's mission is to help low-income women and their children achieve economic self-sufficiency and to move out of poverty. WOW is concerned with ensuring that women have gender equity in all aspects of life, including in interscholastic athletics, because the lack of such equality negatively impacts women's ability to attain economic independence.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to is equal opportunity, which includes the enjoyment of equal rights and treatment as athletes. Women Employed believes that women are entitled to the same rights and opportunities as men, whether their interests lie in sports, arts, or business.

The Women's Law Project (WLP) is a nonprofit public interest law firm located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has worked throughout its history to accomplish gender equity in school athletic programs at all levels, from middle school through college. The application of the nondiscrimination clause of the Fourteenth Amendment to entities like state athletic associations that function as state actors in their regulation of public schools' athletic programs is essential to the ultimate elimination of discriminatory practices in these

programs.

The Women's Sports Foundation is a nonprofit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and creating an educated public that supports gender equity in sports. The Foundation distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of women in sports.

The YWCA of the U.S.A. is the nation's oldest and largest women's membership movement. Operating out of thousands of locations in all 50 states, the YWCA of the U.S.A. represents approximately 2 million women, girls and their families. Its mission – to empower women and girls and to eliminate racism – is the guiding principle for all YWCA fitness, health, child care, violence prevention, shelter, and social justice programs. The YWCA of the U.S.A. is a founding member of the National Girls and Women in Sports Day organization and worked actively to ensure the passage of Title IX.

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IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL VOTING RIGHTS INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus National Voting Rights Institute is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to an equal and meaningful vote, which includes equal and meaningful participation in the entire electoral process.[1] Through litigation and public education, the Institute works to ensure that those who do not have access to wealth are able to participate in the electoral process on an equal and meaningful basis. In its work, the Institute relies on this Court's seminal White Primary Cases finding state action in any integral part of the electoral process. The Institute regards those holdings as directly relevant to the state action issue raised in this case.

SUMMARY OF ARGUMENT

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999) (hereinafter *Brentwood II*), the Sixth Circuit held that the Tennessee Secondary School Athletic Association ("TSSAA") was not a state actor for purposes of 42 U.S.C. § 1983.

The Sixth Circuit found that no symbiotic relationship existed between the State of Tennessee and the TSSAA because "Tennessee explicitly *revoked* its designation of TSSAA to regulate and organize interscholastic athletics when the State Board of Education's rule to that effect was repealed in 1995." *Brentwood II*, 180 F.3d at 765-66 (emphasis in original). A 1995 amendment to the State Board of Education Rules "authorizes the public schools of the state to voluntarily maintain membership" in the TSSAA.

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[1] Pursuant to Rule 37.3(a) the parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no other person or entity made a financial contribution to the preparation or submission of this brief.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 13 F. Supp.2d 670, 675 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999) (hereinafter, "*Brentwood I*"). This change was the "fundamental" basis for the Sixth Circuit's decision. *Brentwood II*, 180 F.3d at 766.

The Sixth Circuit's finding that no symbiotic relationship, and thus no state action, exists in this case is contrary to this Court's precedent. As this Court held in the White Primary Cases, merely changing from an explicit to a covert grant of authority cannot alter the status of the TSSAA as a state actor. *See Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). The State of Tennessee created the TSSAA. As even the Sixth Circuit's ruling implicitly recognizes, a symbiotic relationship existed between Tennessee and the TSSAA before the 1995 rule change. *See Brentwood II*, 180 F.3d at 762 ("Although a State Board of Education rule in effect from 1972 to 1995 'designated' TSSAA to conduct interscholastic athletics, that rule has since been repealed."). The rule change did not affect the TSSAA's structure or function within the state, its use of state resources, the efficiency benefits it confers on the state or any of the other factors demonstrating the close nexus between Tennessee and the TSSAA. The only change effected was that, where Tennessee high schools' membership in the TSSAA was once mandatory, now membership is voluntary. As is clear from the White Primary Cases, however, this change alone does not make state action private. *See Smith*, 321 U.S. 664-65 (holding voluntary association so intertwined with provision of a governmental function as to be state actor); *Terry*, 345 U.S. at 463, 469-70 (finding voluntary club, "not regulated by the state at all," to

be a state actor where club had become an "integral part" of the process of conducting elections).[2]

Under this Court's precedent, it is immaterial that Tennessee does not directly control that part of the educational process which it leaves for the TSSAA to manage. *Terry*, 345 U.S. at 469. In fact, Tennessee "has so far insinuated itself into a position of interdependence with [the TSSAA] that it must be recognized as a joint participant" in the coordination of interscholastic athletics among secondary schools in the state. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). TSSAA coordination of interscholastic athletics has become an integral part, indeed the only effective part, of determining how the high schools in Tennessee relate to one another on the playing field. *Terry*, 345 U.S. at 469. As such, the TSSAA is a state actor for purposes of § 1983, the decision of the Sixth Circuit should be reversed and this case should be remanded for proceedings on the merits of Brentwood Academy's claims. *See id.*

ARGUMENT

I. The Sixth Circuit's Decision Is Contrary To The White Primary Cases

A. Under The White Primary Cases, A Voluntary Association May Be A State Actor

The White Primary Cases addressed efforts by the State of Texas to prevent blacks from voting in Democratic party primary elections and to subvert—through the use of nominally private actors—this Court's directives that those

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[2] *See also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) ("If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.").

efforts cease. In each instance, this Court saw through Texas' chicanery and found state action.

In the first of these cases, *Nixon v. Herndon*, the Court struck down an express Texas statute that prohibited blacks from voting in Democratic party primaries. 273 U.S. at 540-41. Writing for the Court, Justice Holmes found it "hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment]." *Id.* at 541. What followed were a series of attempts by the State of Texas to subvert Justice Holmes' ruling by continuing its discriminatory practices through nominally private third party actors.

Texas' first attempt to continue its discriminatory voting policy through a third party actor was addressed in *Nixon v. Condon*, 286 U.S. 73 (1932). In *Herndon*'s wake, the Texas Legislature repealed the offending statute and replaced it with the following:

> [E]very political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this Sate because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.

Condon, 286 U.S. at 82. Acting under this statute, the State Executive Committee of the Democratic party ("SEC") resolved "that all white democrats who are qualified under the constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928." *Id.*

At issue in *Condon* was whether the SEC's resolution constituted state action. *Id.* While Texas no longer had a statute on its books preventing blacks from voting in a Democratic primary, the SEC resolution had the same practical effect on voting rights—the election judges who administered Texas's ballot process continued to enforce discriminatory voting practices. Thus, the same Mr. Nixon who had been prevented by the election judges from voting in a 1924 Democratic primary by direct operation of Texas statute (*Herndon*, 273 U.S. at 539-40), was this time prevented by the election judges from voting in a 1928 Democratic primary by operation of the SEC resolution. *Condon*, 286 U.S. at 82. Mr. Nixon once again sued the "judges of election to recover damages for their refusal by reason of his race or color to permit him to cast his vote at a primary election." *Id.* at 81.

The election judges argued that while the result might have been the same, the method of achieving the result was critically different. *Id.* at 83. Where in *Herndon*, the election judges had followed a statutory mandate, in *Condon* they were merely executing a resolution of a voluntary association. *Id.* As a voluntary association, the Democratic party was free to regulate its own membership and the resolutions of its SEC were no more state action than those of a "golf club" or "Masonic lodge." *Id.* Absent state action, the election judges argued, there could be no constitutional violation. *Id.*

The *Condon* Court rejected the election judges' argument. The new statute, the Court held, granted power to prescribe the qualifications of membership and determine voting qualifications to the SEC. *Id.* at 84. If these powers of self regulation were intrinsic to a voluntary organization, the court ruled, they reside with the full State Convention of the Texas Democratic party, and not the governing SEC. *Id.* at 84-85. Since the State Convention had never authorized the SEC to limit party primaries to white voters, the SEC's resolution

was an exercise of statutory rather than inherent powers. *Id.* at 85. Thus, the SEC was acting not as a voluntary association but rather as an organ of the state itself—"the repositor[y] of official power"—and was bound to act within the confines of the Constitution. *Id.* at 88. The Court specifically reserved judgment on whether a voluntary organization exercising wholly inherent powers could nonetheless be a state actor. *Id.* at 84.

B. Voluntary Organizations Enmeshed In The Performance Of A Public Function Are State Actors

The Court answered that question in the affirmative in *Smith v. Allwright*, 321 U.S. 649 (1944). At the May 24, 1932 State Convention, the Texas Democratic party adopted the following resolution:

> Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such entitled to participate in its deliberations

Id. at 656. In the suit that inevitably arose, the judges of election again "defended on the ground that the Democratic party of Texas is a voluntary organization" and, as such, was "free to select its own membership and limit to whites participation in the party primary." *Id.* at 657.

The *Smith* Court again rejected the elections judges' voluntary organization argument. Faced with a voluntary organization exercising what *Condon* had recognized as inherent self-regulatory power, the Court examined the interrelationship of the state and the Democratic primary process. *See id.* at 662-64. The Court, citing numerous instances of entanglement, found that the state was intimately involved in the "system for the selection of party nominees for inclusion in the general election . . . ." *Id.* at 663. In turn,

the Court found, the party primary process had "become a part of the machinery for choosing officials, state and national . . . ." *Id.* at 664. The Court concluded that when membership in a party was "also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state." *Id.* at 664-65. Thus, the conduct of a voluntary organization can be state action where the acts of the organization and those of the state are sufficiently intertwined. *See id.*

II. Under The Rationale Expressed In The White Primary Cases, The TSSAA Is A State Actor

As in the White Primary Cases, Tennessee cannot distance itself from an activity by statutory manipulation. Its delegation of educational functions to a "voluntary" organization does not prevent that organization from being a state actor. Viewed in the light of the White Primary Cases, the symbiotic relationship between the TSSAA and the public, state-controlled school system renders the TSSAA a state actor. The TSSAA here offers the same defense as did the Texas election judges—that it is "voluntary" and can proscribe whatever it wants. But this rationale, and the rationale of the Sixth Circuit, fails because the TSSAA is "a part of the machinery" of the public function of providing a high school education. *See Smith*, 321 U.S. at 664; *see also Terry*, 345 U.S. at 469 (finding private club a state actor where it "has become an integral part, indeed the only effective part" of the provision of a public function).

A. The Functions Of The TSSAA Are Part Of Tennessee's Core Governmental Functions

Providing elementary and secondary public education is a core governmental function of the State of Tennessee. Tennessee's constitution requires "the diffusion of the

opportunities and advantages of education throughout the different portions of the state" through the creation of a "perpetual fund" devoted to "the support and encouragement of common schools throughout the state."[3] TENN. CONST. art. XI, § 12. To this end, the Tennessee General Assembly established a "system of public education" and created a State Board of Education ("SBE") empowered to administer that system. TENN. CODE ANN. §§ 49-1-101 & 102.

Interscholastic athletics are a longstanding component of the educational experience authorized by the SBE and offered by public schools in Tennessee. *See Brentwood I*, 13 F. Supp.2d at 684 ("The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." (citing TSSAA Const. art. 1, § 2)). By state law, participation in interscholastic athletics may be substituted for the physical education graduation requirement. *Id.* (citing TENN. BD. OF EDUC. RULE 0520-1-3-.06).

As a practical matter, the SBE or the public schools themselves must find some means to facilitate interscholastic play, including devising rules governing play, equipment, training, player and team eligibility. They could accomplish this task in one of two ways. Each school could work out rules governing competition with every other school in the state in a bilateral fashion. This solution would be cumbersome and likely would result in a patchwork of rules governing play in different regions of the state. Alternatively, the SBE could (either by itself or by proxy) create and

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[3] In this fund, the Tennessee constitution invested "all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools." TENN. CONST. art. XI, § 12. As discussed below, the TSSAA now exercises control over lands held in this fund. *See infra*, p. 13.

enforce a coordinated system of statewide rules applicable to all schools.

Choosing the second alternative, the SBE tapped the TSSAA to act as its proxy in coordinating interscholastic athletics. According to its charter or constitution, the TSSAA was established "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." *Brentwood I*, 13 F. Supp.2d at 673 (quoting TSSAA CONST. art. I, § 2). Since 1925, the SBE has recognized the role of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee. *Id.* at 675. In 1972, the SBE enacted a rule designating the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Id.* (quoting TENN. BD. OF EDUC. RULE 0520-1-2-.26 (current version at Rule 0530-1-2-.08)). At the same time, the SBE approved the then current rules and regulations of the TSSAA (including the Recruiting Rule at issue here) and reserved the right to review and approve the appropriateness of future changes—a power it regularly exercised. *Id.*

In creating and enforcing a coordinated system of rules for interscholastic athletics, the TSSAA is "not acting in matters of merely private concern like the directors or agents of business corporations. [It is] acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly." *Condon*, 286 U.S. at 88.

B. The 1995 Amendment To The SBE Rule Did Not Alter The TSSAA's Status As A State Actor

In 1995 the SBE replaced the former Rule 0520-1-2.08, which had on three occasions been interpreted as investing

the TSSAA with the authority of the state,[4] with the following new language:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Brentwood I, 13 F. Supp. at 675 (quoting TENN. BD. OF EDUC. RULE 0520-1-2-.08) (the "1995 Amendment").

Nothing about the function or purpose of the TSSAA, the realities of its control over secondary school athletics, or the composition or leadership of the TSSAA, changed in any

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[4] Based on the factors discussed *infra* at 11-14, the TSSAA was held to be a state actor on at least three occasions prior to 1995. *See Graham v. Tennessee Secondary School Athletic Ass'n*, 1995 U.S. Dist. LEXIS 3211, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995), *appeal dismissed as moot*, 107 F.3d 870 (6th Cir. 1997); *Crocker v. Tennessee Secondary Schools Athletic Ass'n*, 735 F. Supp. 753 (M.D. Tenn.), *aff'd*, 908 F.2d 972 and 908 F.2d 973 (6th Cir. 1990); *Kelley v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968).

Numerous other courts have found similar interscholastic athletic associations to be state actors as well. *See, e.g., Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) ("Every court to consider the question has concluded that associations like the AIA are so intertwined with the state that their actions are considered state action." (citing cases)); *see also Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) ("Public schools make up 85% of the IHSA's membership, and although the IHSA is a purely voluntary association, the overwhelmingly public character of the IHSA membership is sufficient to confer state action for the purpose of § 1983." (citing cases)); *In re United States ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (finding state action); *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224, 227-28 (5th Cir. 1968) (examining nexus between state and association and finding "state action in the constitutional sense").

material respect as a result of the 1995 Amendment. The only change wrought by this amendment was to make public schools' membership in the TSSAA voluntary rather than mandatory. Nevertheless, the Sixth Circuit used this change as the primary basis for reversing the district court's holding that "[t]he close identification of the TSSAA with the State's provision of education is a sufficient nexus to find state action in this case." *Compare Brentwood I*, 13 F. Supp.2d at 685, *with Brentwood II*, 180 F.3d at 765-66. This reliance on the distinction between a voluntary and a compulsory organization is contrary to this Court's holdings in the White Primary Cases.

1. *The TSSAA Is Deeply Enmeshed In The Tennessee Public Education System*

Despite the 1995 Amendment, interscholastic competition in Tennessee still mainly occurs on public grounds, in public facilities, and using public equipment. The SBE and the public schools themselves still rely upon the TSSAA to control the scheduling, participation in and control of athletic events in public schools. *Brentwood I*, 13 F. Supp.2d at 681. The TSSAA still prescribes uniform rules of play, regulates the eligibility of public school students to participate in interscholastic athletics, and acts as the only organization providing these benefits to the public schools of Tennessee. *Id.* at 683. The TSSAA remains governed by the same group of public school principals, enforces the same rules, and exerts the same real world control over secondary school athletics. It is next to impossible for a high school in Tennessee to field an interscholastic athletic team without subscribing to the rules and regulations of the TSSAA. "It is immaterial that the state does not control that part of [the educational system] which it leaves for the [TSSAA] to manage. The [TSSAA] has become an integral part, indeed the only effective part," of supervising interscholastic athletics in Tennessee. *Terry*, 345 U.S. at 469; *see also Smith*, 321 U.S. 664 (finding state action where actor has "be-

come a part of the machinery" of performing a public function).

The TSSAA is an association of public, independent and parochial secondary schools from across Tennessee. *Brentwood I*, 13 F. Supp.2d at 673. It is composed of 290 public schools and 55 independent and parochial schools. *Id.* Public high schools comprise 84% of the voting membership of the TSSAA, with independent and parochial schools making up the remaining 16%. *Id.* The rules and regulations of the TSSAA are enacted by its Legislative Council, a nine-member body made up of high school principals or assistant principals or qualified superintendents elected by popular vote in each of nine electoral districts. *Id.*

The administrative authority of the TSSAA is vested in a Board of Control, composed of nine members who are high school principals or superintendents, similarly elected by popular vote. *Id.* Throughout the relevant time period, all the voting members of the Legislative Council and the Board of Control were public high school administrators. *Id.* As a result, state employees—public high school administrators—have direct control over the development and implementation of TSSAA rules and regulations.

Tennessee devotes substantial resources to the TSSAA to help it perform its functions. The TSSAA pays employee salaries and other expenses of the association primarily out of revenues derived from games between member schools. *Id.* at 679. Employees of the TSSAA are covered by the State retirement system and, by statute, are included in the definition of "teachers" for that purpose. *Id.* at 684 (citing TENN. CODE ANN. § 8-35-118). For a school to be a member of the TSSAA, its coach must have a Tennessee State teaching license, must be a full-time employee of the Board of Education, and must be paid entirely from funds approved by the Board of Education or the governing board of the school. *Id.* (citing TSSAA BYLAWS, art. III, § 7).

For seventy-five years, the SBE has exercised its plenary power by granting control over lands held in the common school fund to the TSSAA for use in interscholastic athletics. *See id.* at 675. The 1995 Amendment had no effect on the TSSAA's control over these public facilities. The TSSAA could exercise no power over these properties without a delegation of authority by the state. *See Condon*, 286 U.S. 88 ("The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official state power.").

Given Tennessee's extensive involvement in the operation of the TSSAA, and the TSSAA's extensive involvement in and the facilitation of the provision of public education in Tennessee, the TSSAA must be considered a state actor. *See Terry*, 345 U.S. at 474 (Frankfurter, J. concurring) ("The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to provide a government benefit).

2. *The TSSAA Has Authority To Supervise And Sanction Public Entities And Officials*

That the TSSAA acts in a governmental capacity in its oversight of interscholastic athletics is perhaps best exemplified by its ability to regulate and censure public officials. TSSAA rules require that public school principals and coaches submit certain reports to the association on a regular basis. *Brentwood I*, 13 F. Supp.2d at 684. In fact, the TSSAA Bylaws provide that principals—state-paid, state-supervised, public officials—are responsible to the association in all matters pertaining to athletic relations of their schools. *Id.* Initial responsibility for assuring compliance with all TSSAA rules and regulations is placed in the hands of the principals. *Id.* State employees, therefore,

are accountable to the TSSAA for the primary implementation and adherence to its rules.

When these coaches, schools, principals and superintendents fail to comply with the TSSAA's rules, the TSSAA has the power to conduct an extensive investigation of any violation and impose sanctions for misconduct uncovered. *Id.* at 683. The TSSAA can levy monetary fines against the public schools of Tennessee and has the power to keep schools from competing against other schools. *Id.* at 683-84. Thus, public schools—state agencies—are subject to TSSAA discipline. *Id.* TSSAA rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics.

The exercise of such extensive power over government officials is clearly not organic to a voluntary organization. *Cf. Condon*, 286 U.S. at 85 ("Power so intrenched is statutory, not inherent."). Rather, the power to compel regular reports from principals and schools, to investigate their conduct, to impose monetary fines, and to exclude them from benefits available to other public schools in the state must come "not as the delegates of the [voluntary organization], but as the delegates of the state." *Id.*

CONCLUSION

For the foregoing reasons, the Court should find that the TSSAA, in drafting and enforcing its Recruiting Rule, is a state actor for purposes of 42 U.S.C. § 1983

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IN THE

Supreme Court of the United States

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BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION
and RONNIE CARTER,
Executive Director and Individually,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF THE FLORIDA HIGH SCHOOL ACTIVITIES ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPORT OF RESPONDENT

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STATEMENT OF ISSUES PRESENTED

The Florida High School Activities Association, Inc. (FHSAA) agrees with and supports the arguments that TSSAA is not a state actor contained in the Brief of the Tennessee Secondary School Athletic Association (TSSAA) and the Brief of *Amicus Curiae* Interscholastic Associations, et al, in support of the affirmance of the decision of the United States Court of Appeals for the Sixth Circuit. This Brief is filed specifically in response to arguments made in the *Amicus* Briefs of the National Women's Law Center and of the Tennessee Lawyers Association for Women (TLAW). Those arguments contend that there exist a potential for sex or gender discrimination in the event TSSAA is determined not to be a state actor.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, similar to the TSSAA, is a private, voluntary interscholastic (as opposed to intercollegiate) association.[1] While *Amicus'* structure may vary slightly from that of TSSAA, it shares significant key traits with TSSAA which renders the present case of critical importance to its historical status as a private association subject to the laws of the State of Florida. If the Sixth Circuit decision is affirmed, the decision will provide clear guidance in Florida in connection with disputes arising between and among the private school and public school members of FHSAA relative to the enforcement of its policies and bylaws. Affirmance will result in the treatment of interscholastic associations, like all other private associations under Florida law, consistent with and pursuant to the terms of its Constitutions, Bylaws and Policies, freely adopted by and between the FHSAA members.

SUMMARY OF ARGUMENT

The issue before this Court in this case is whether TSSAA is a state actor for constitutional purposes. There is no issue related to gender equity. Therefore, this Court's opinion in *United States v. Virginia*, 518 U.S. 515 (1996) is not relevant to any issue in this case.

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[1] The parties' written consent to the filing of this Brief has been filed with the Court. No counsel for any party authored this Brief in whole or in part, and no person or entity other than the *Amicus Curiae* and its counsel made any monetary contribution to the preparation or submission of this Brief.

ARGUMENT

The argument contained in this Brief is limited to a response to the argument presented in the Brief of *Amicus Curiae* The Tennessee Lawyers' Association for Women (TLAW) in Support of Petitioner and the argument alluded to in the Brief of The National Women's Law Center, et al, as *Amicus Curiae* in Support of Petitioner, both related to gender equity. Until the filing of TLAW's *Amicus* Brief, gender equity has never been an issue in this case. Gender equity is raised for the first and only time in this case by the *Amicus* Brief of TLAW.

Obviously the parties have not been concerned with gender equity in this case, neither should this Court be. In Section VI of its Brief, TLAW asserts that *United States v. Virginia*, 518 U.S. 515 (1996) (referred to hereafter as the "VMI case") is relevant to an understanding of this case. TLAW then immediately acknowledges that the relevance of the VMI case is not apparent at first blush. In an attempt to show relevance TLAW, referring to the VMI case, then states: "The Court held that the Commonwealth of Virginia must make available to 'her daughters' the same opportunity that it had made available since 1839 to 'her sons' . . .." *TLAW Brief*, page 22. No claim has been made in this case that TSSAA has not made available to "her daughters" the same opportunities to participate in interscholastic athletics that it made available to "her sons."

The issue before this Court in this case is whether TSSAA acted under the color of state law for purposes of 42 U.S.C. § 1983 when it enforced its recruiting rule against Brentwood Academy, a private school that voluntarily joined TSSAA and agreed in its membership

contract to comply with TSSAA rules and decisions. *Brief of Respondent*. The issue stated by this Court in the VMI case is as follows:

> The cross-petitions in this suit present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women "capable of all of the individual activities required of VMI cadets," 766 F.Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, id., at 1413—as Virginia's sole single-sex public institution of higher education—offends the Constitution's equal protection principle, what is the remedial requirement?"

United States v. Virginia, 518 U.S. 515, 530, 531 (1996). When the issues in both cases are compared, it is obvious that the relevance of the VMI case is not only "not apparent at first blush," as TLAW admits; it is nonexistent.

The VMI case was clearly decided on a question of equal protection of the law. The VMI case began as a result of a complaint filed with the Attorney General by a female high-school student seeking admission to VMI. As a result of this complaint, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusive male admission policy violated the equal protection clause of the Fourteenth Amendment. *Id.* at 523. The District Court ruled in favor of VMI and rejected the equal protection challenge made by the United States.

This judgment was appealed to the Court of Appeals for the Fourth Circuit. The Fourth Circuit vacated the District Court's judgment and held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." *Id.* at 524, 525. The Fourth Circuit suggested three options for Virginia to follow: "Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution." *Id.* at 525, 526.

"In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL)." *Id.* at 526. VWIL would be a state-supported undergraduate program located at Mary Baldwin College, a private liberal arts school for women, and would be open initially to about 25 to 30 students. VWIL would share VMI's mission — to produce "citizen-soldiers" —; however, the VWIL program would differ from VMI in academic offerings, methods of education, and financial resources.

Virginia sought approval in the District Court of the proposed remedial plan and the District Court decided the plan met the requirements of the equal protection clause. *Id.* at 527. This judgment of the District Court was affirmed by a divided Fourth Circuit Court of Appeals and the case arrived at this Court.

This Court found that Virginia had shown no "exceedingly persuasive justification" for excluding women from the citizen-soldier training afforded by VMI and therefore affirmed the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth

Amendment Equal Protection Clause. *Id.* at 534. This Court then reversed the Fourth Circuit Final Judgment because the remedy proffered by Virginia — the Mary Baldwin VWIL program — did not cure the constitutional violation by providing equal opportunity. *Id.* at 534.

From this analysis of the VMI case, it is obvious that the VMI case has no relevance to the issues presented in this case. Clearly Virginia, and therefore, VMI were state actors. No issue of recruiting was presented in that case. In fact, VMI did not want the involvement of the female students.

TLAW argues that schools and students should not be deprived of a viable choice. They reject TSSAA's argument that membership in it is voluntary and that a dissenting school can simply withdraw from the Association if it does not like its rules. It then states: "Of course, if this happened, the students at that school would have no opportunity whatsoever to participate in a full program of interscholastic sports. They would have no chance to become state champions at any sport." *TLAW Brief,* page 23. This argument is not supported by any facts. This argument made by TLAW was rejected by this Court in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988). In that case, this Court stated:

> "Tarkanian argues that the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands. We are not at all sure this is true, [FN19] but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under the color of state law."

> FN19. The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent.

Id. at 198, 199.

TLAW's attempt to compare the constitutional right of the Virginia women students to enjoy the same system of education provided for the Virginia male students at VMI with a private school's student's desire to participate in interscholastic activities (which has never been held to be a constitutionally protected right or privilege) is misplaced. This argument is not relevant to any issues before this Court in this case.

TLAW's next statement: "Likewise, Tennessee high school students, be they women students or private school students, should not be deprived of the possibility of playing interscholastic sports because the TSSAA imposes arbitrary or punitive rules." *TLAW's Brief*, page 23. First, there is no support for the statement that TSSAA imposes arbitrary or punitive rules. In addition, there is no comparison between women students (not at issue here) who are members of a protected class and private school students who are not members of a protected class. *United States v. Virginia*, 518 U.S. at 532.

TLAW then states: "Many court decisions have addressed the need to protect women's access to athletics." And: "Additionally, by enacting Title IX, Congress enunciated that it is the public policy of this nation that women shall be treated fairly in their access to athletic

opportunities." *TLAW Brief*, page 26. In this argument TLAW refers to the statistical data provided in the Brief of *Amicus Curiae* The National Women's Law Center. Although this information is interesting, it is irrelevant to any issue in this case. There is no claim in this case that women are being denied access to athletics or that TSSAA has violated Title IX. The issue in this case is whether TSSAA is a state actor for constitutional purposes.

Without any support, TLAW argues that: "The most likely forms of discrimination to occur if the TSSAA is not held to be a state actor will be gender and racial discrimination, or at least discrimination that unfairly burdens and discriminates against female athletes." *TLAW Brief*, page 28. Then again, without support TLAW argues: "If this Court affirms the Sixth Circuit, then, since other states surely have clever people watching this case, the progress that has been made will begin eroding before the ink is dry on this Court's opinion." *TLAW Brief*, page 28. This argument certainly requires a quantum leap in logic and attributes unjustified bad faith, without any supporting record proof, to associations such as *Amicus* FHSAA.

TLAW's gender discrimination argument overlooks many factors and, once analyzed, is easily rejected. First, students in public schools, both male and female, will continue to have rights under Section 1983 against the school that they attend. Female students who attend public schools will continue to have rights against that school under Title IX. Membership in TSSAA or in any of the other *Amicus* interscholastic activities associations will not relieve the public school from its constitutional duties or from its responsibilities under Title IX.

These schools will not be able to avoid their constitutional duties or their responsibilities under Title IX by an argument that they are following the TSSAA rule or their Association's rules. If a member school of TSSAA determines that it is potentially subjected to liability under either Title IX or Section 1983 for complying with a TSSAA rule, that member school has the choice of terminating its membership in TSSAA or of securing a change of the rule. One would expect the rule to be changed because if one school is being subjected to liability by a TSSAA rule, other similarly situated schools would be affected.

The analysis of TLAW's argument as to non-public schools is different but does not support TLAW's argument. If the non-public school receives federal funds, as many non-public schools do, that school would be subject to the provisions of Title IX as it relates to the females attending that school, although there may be no Section 1983 exposure for those schools. It must be remembered that the student at the non-public school chooses to attend the non-public school. The student knowingly and voluntarily risks the loss of constitutional rights that the student would have if he or she attended a public school. That is the choice the student makes and should not be of concern to this Court.

If this Court were to reverse the Sixth Circuit and hold that TSSAA is a state actor, the incongruous result would be that a student at a nonpublic school would have no constitutional rights against the school; but by virtue of the school's decision to join TSSAA, the student would have constitutional rights against TSSAA. The student would have no constitutional rights related to the regular school curriculum at the non-public school, or with respect to other school-related activities; how-

ever, he or she would have constitutional rights with respect to the extracurricular activities of athletics. The student would not be able to sue his school under Section 1983 for violation of his rights as a result of the school's decision declaring the student ineligible to participate in interscholastic activities, but the student would be able to sue TSSAA under Section 1983 if the association declared the student ineligible. It is easily seen that these are results which should not occur.

In the final analysis, under the Sixth Circuit's decision students in private schools have no fewer rights if TSSAA is not a state actor, and students in public schools have all the usual federal law protection available to them as against the school itself because it is ultimately the school's voluntary decision to follow TSSAA rules.

CONCLUSION

There is no valid gender based argument in either the Brief of *Amicus* The National Women's Law Center or the Brief of *Amicus* The Tennessee Lawyers Association for Women that would justify this Court's reversal of the Sixth Circuit's opinion determining that TSSAA is not a state actor. The Sixth Circuit should therefore be affirmed.

Respectfully submitted,

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On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION IN SUPPORT OF RESPONDENTS TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION AND RONNIE CARTER

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I. INTEREST OF AMICUS CURIAE

Amicus Kentucky High School Athletic Association (the "KHSAA") is a voluntary, unincorporated association consisting of approximately 286 public, private and parochial member schools located throughout the Commonwealth of Kentucky. The KHSAA was organized in 1917 by principals of several schools for the purpose of regulating high school athletics in Kentucky.[1] The KHSAA, like the Tennessee Secondary School Athletic Association (the "TSSAA") works to ensure that member schools compete in a fair and safe athletic environment. If the TSSAA's Recruiting Rule is held unconstitutional, the KHSAA is concerned that the ability of all state high school athletic organizations to protect the competitive equity of the high school sports experience will be fatally compromised. Additionally, the KHSAA is concerned that the elimination of recruiting rules will make athletically gifted children and their parents – many of them from economically and socially disadvantaged backgrounds – vulnerable to coercive and abusive recruiting practices.

II. SUMMARY OF ARGUMENT

The state action question is merely the first hurdle that Brentwood Academy must cross before it can achieve its ultimate goal: the use of First Amendment principles to invalidate the TSSAA's Recruiting Rule and cripple the ability of the TSSAA to regulate Brentwood

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[1] Pursuant to Rule 37.3(a) the parties have consented to the filing of this brief. The written consent signed by the parties has been tendered to the Clerk of this Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no other person or entity made a financial contribution to the preparation or submission of this brief.

Academy's powerful, abusive athletic program. Brentwood Academy cannot ultimately prevail in this litigation unless it can demonstrate not only that the TSSAA is a state actor, but also that the TSSAA deprived Brentwood Academy of its civil rights – specifically, its alleged First Amendment free speech right to recruit athletes.

In its Brief, Brentwood Academy labels its First Amendment argument "The School Choice Concern" and waxes eloquent about the alleged high constitutional stakes of this case. (*See* Petitioner's Brief, pp. 24-26.) According to Brentwood Academy, this case is about nothing less than the state's attempt to "own" school age children. In Brentwood Academy's view, the TSSAA "commodifie[s] students" and treats them as mere means to a rather banal communal end – winning high school sports championships. (*Id.* at pg. 24.) Were this case about an attempt to end private sectarian education, or were this case about an attempt to regulate the content and nature of private education, then the weighty issues of "ownership" and "commodification" would need to be addressed. However, this is not such a case.

By peering through the fog of lofty rhetoric to the more humble reality of the situation, it becomes clear what is actually at stake in this litigation – Brentwood Academy's attempt to "have it all." Brentwood Academy has taken the legitimate, constitutionally-protected step of creating an academic, Christian institution that is outside and independent of the public school system. Brentwood Academy's unquestioned right to create such an institution is not at issue here. Nor is its unquestioned right

to attract students to educate and enlighten. What is at issue is the second step — Brentwood Academy's voluntary step *back into* the state arena for the sake of public athletic achievement. Let us be clear, if Brentwood Academy's sole athletic concern was the provision of a forum for physical education and competition for its students, it would not have to be a member of the TSSAA. Brentwood Academy is perfectly free to opt out of (or not join in the first instance) the TSSAA structure and engage in athletic competition with other, like-minded schools. In Kentucky, for example, several sectarian high schools have chosen just such a path and have formed their own, independent leagues.

Unfortunately, this path is generally not the path to glory. If Brentwood Academy were to choose to leave the TSSAA, and thereby lose its right to compete for the TSSAA championship, it would forfeit its national reputation as a high school football powerhouse. Gone would be the articles in *USA Today* and the *Nashville Tennessean*. Gone would be the national rankings and the local notoriety. Brentwood Academy would be left simply as a private, Christian school full of students free to study, grow, and play sports – all in relative obscurity. While such obscurity would be a bitter pill for the coaches and many of the school's boosters, it would not constitute a deprivation of constitutional rights.

With this lawsuit, Brentwood Academy is not just seeking the right to compete within the TSSAA, it is seeking the "right" to compete on its own terms. As a private school, free of any geographic restrictions on student attendance, Brentwood Academy is able to recruit students throughout Tennessee. Through scholarships and other enticements that Brentwood Academy believes it has a constitutional right to offer, every

good quarterback, lineman and cornerback in junior high is a potential Brentwood Academy star. By contrast, public high schools are tied to definite, limited geographic regions. For Hillsboro High School in Nashville to entice the best, it would somehow have to persuade entire families to uproot, leave their community and move to a new home in Hillsboro's district. Faced with such an obviously imbalanced playing field, the TSSAA has chosen to prohibit all schools from recruiting. Brentwood Academy challenges this restriction, not (as they contend) for the sake of liberty, but rather for the sake of Greater Gridiron Glory. First Amendment doctrine should not be butchered for the sake of Brentwood Academy's athletic hubris.

There are multiple reasons why the TSSAA's Recruiting Rule does not violate Brentwood Academy's free speech rights. First, the Recruiting Rule is a rational restriction that is within the scope of the TSSAA's legitimate oversight of high school athletics. When Brentwood Academy voluntarily joined the TSSAA, it made itself subject to such rational restrictions. The government is clearly able to impose restrictions – even content-based restrictions on speech – that are related to and within the scope of government programs or benefits offered. For example, the "gag rule" on athletic recruiting imposed by the TSSAA is no more onerous than the "gag rule" on abortion information formerly imposed by the federal government – and upheld by this Court – on recipients of Title X funding. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

Additionally, the "public concern" doctrine outlined in *Connick v. Myers*, 461 U.S. 138 (1983) and *Board of County Commissioners, Waubaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) should be applied to

Brentwood Academy, a voting member of an alleged state organization. If the TSSAA is a state actor, then Brentwood Academy, as a voting member, is a part of that government and certainly as closely related to the state as any employee or contractor. Unlike most state employees or contractors, Brentwood Academy has a voice in the actual content of all of the TSSAA's regulations, including the Recruiting Rule. When Brentwood Academy is subject to speech-related rules that are related to its voluntary membership in a state organization, related to the conduct of that organization and do not touch on matters of public concern, then its complaints about those rules should not be cognizable in this Court.

Finally, at most, Brentwood Academy's recruiting activities constitute nothing more than commercial speech. Brentwood Academy is seeking the right to propose commercial transactions – the enrollment of tuition-paying students – to selected individuals with demonstrated athletic talent. As commercial speech, the Recruiting Rule is only subject to "intermediate" First Amendment scrutiny. The TSSAA is attempting to guard two substantial interests: i) a child's (and his or her family's) freedom from coercive and destructive recruiting environments; and ii) its member school's interests in a fair and equitable "playing field." The Recruiting Rule directly advances those interests and is sufficiently narrowly drawn to pass intermediate scrutiny. Thus, even if the TSSAA is a state actor, Brentwood Academy's underlying First Amendment free speech claims are without merit. The judgment of the Sixth Circuit should be affirmed.

III. ARGUMENT OF AMICUS CURIAE

A. The Recruiting Rule Is A Rational Regulation Reasonably Related To The Voluntary Acceptance Of The Benefit Of TSSAA Membership And, Therefore, Is Constitutional.

Brentwood Academy claims that, by requiring that its member schools adhere to the Recruiting Rule, the TSSAA is unconstitutionally "suppressing speech" and "thereby restricting educational opportunity for students." (Petitioner's Brief, at pg. 25.) This argument is a gross exaggeration of the true purpose, nature and consequences of the TSSAA's Recruiting Rule. In reality, the TSSAA has created a rational, limited regulation that is directly related to the goals and mission of the TSSAA itself – the creation of safe and fair athletic environments. When Brentwood Academy elected to receive the benefits of TSSAA membership, it made itself subject to reasonable regulation related to those benefits. This Court has long held that such regulations, even if speech-related, are acceptable so long as the regulation imposed is directly related to the benefit received.

> The most comparable case is *Rust v. Sullivan, supra*. In *Rust*, the plaintiffs challenged federal regulations that prohibited Title X projects and recipients of Title X funding[2] from providing patients and the public with certain information regarding abortion. 500 U.S. at 173.

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[2] 2 Title X of the Public Health Service Act, 84 Stat. 1506, was enacted in 1970 and provides for federal funding for family planning services. *Rust*, 500 U.S. at 173.

> The challenged regulations were both broad and specifically content-based. First, the regulations specified that a Title X project "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Id.*, at 179 quoting 42 CFR § 59.8(a)(1) (1989). Second, the regulations broadly prohibited a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." *Id.* quoting 42 CFR § 59.10(a) (1989). Third, the regulations required that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. *Id.* at 180, quoting 42 CFR § 59.9 (1989). Collectively, these regulations became known as the "gag rule."

Before this Court, the plaintiffs argued, among other things, that the "gag rule" was unconstitutional because it conditioned the receipt of a benefit (*i.e.*, Title X funding) on the relinquishment of a constitutional right (*i.e.*, the right to engage in abortion advocacy and counseling). *Id.* at 196. The Court disagreed, holding that plaintiffs' reliance on "unconstitutional conditions" cases was "unavailing."

> . . . here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purpose for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.

Id.

The Court distinguished "unconstitutional conditions" cases, noting that those cases involved situations where the government placed conditions on the "recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct *outside the scope of the federally funded program*." *Id.* (emphasis added). For example, in *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), the Court invalidated a federal law prohibiting noncommercial television and radio stations that received federal funds from engaging in any editorializing. The fund recipient could not segregate its activities according to funding and thereby had to forfeit all of its rights to editorialize in exchange for receiving even 1% funding. 468 U.S. at 400. However, the Court specifically noted that the regulations would be valid if they permitted stations to establish "affiliate" organizations which "could then use the station's facilities to editorialize with nonfederal funds."

Similarly, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court invalidated a requirement by the State of California that anyone seeking to take advantage of a specific tax exemption must first sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. In *Speiser*, there was no real argument that the prohibited speech was in any way realistically related to the property tax exemption. Instead, the denial of tax exemptions to those who would not sign the declaration was "frankly aimed at the suppression of dangerous ideas." 357 U.S. at 519.

If the TSSAA Recruiting Rule prohibited, as a condition to membership, TSSAA schools from ever recruiting any prospective student, regardless of athletic prow-

ess or interest, or if the TSSAA required that Brentwood Academy sign a loyalty oath to the public school system, then an unconstitutional condition might exist. The Recruiting Rule, however, is limited to the specific scope of the alleged government benefit at issue here – membership in a state high school athletic association. The rule only prohibits the "use of undue influence on a student" to secure or retain a student "*for athletic purposes*." *See*, Article II, Section 21, TSSAA By-Laws (emphasis added). In other words, students are not to be "singled out" based on their potential athletic ability.

Brentwood Academy would have the Court believe that the TSSAA is seeking to stamp out private education by prohibiting virtually all contact between private school officials and prospective students. By reading the Recruiting Rule more broadly than its plain language allows, Brentwood Academy has created a straw man. The Recruiting Rule is directly tied to the provision of the alleged state benefit – membership in a state high school athletic association – and, therefore, is within the scope of the alleged state program. As *Rust* makes clear, gag rules can even be imposed on speech concerning the exercise of fundamental constitutional rights when those rules are in direct furtherance of the constitutionally permissible goals of a government program. *See also Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding the federal statutory requirement that Section 501(c)(3) charitable organizations refrain from substantial lobbying activities as a precondition to tax-exempt status).

The District Court, by simply inquiring whether the Recruiting Rule is content-based (of course it is), completely missed the proper First Amendment analysis. (*See Brentwood Academy v. Tennessee Secondary Schools*

Athletic Association, et al., 13 F. Supp.2d 670, 688 (M.D. Tenn. 1998). The regulations examined in *Rust* were content-based and so was the statute upheld in *Regan*. The critical first inquiry is not into content but into context. When Brentwood Academy is speaking in the context of its voluntary membership of the TSSAA and speaking in direct violation of TSSAA rules, strict scrutiny simply does not apply. As mentioned above, the correct inquiry is into the relationship of the challenged rule to the goals and scope of the government benefit. When the state's goals are legitimate – as protection of minors from undue influence and the protection of institutions from unfair advantage undoubtedly is – and participation voluntary, then Brentwood Academy's only hope is to challenge the scope of the regulation. Few rules are more within the scope of high school athletics than rules regarding, and limited to, the recruitment of athletes.

B. Because Brentwood Academy Is A Voting Member Of An Alleged State Organization, The "Public Concern" Doctrine Is Applicable And Fatal To Brentwood Academy's Claims.

It has by now become well-established that the First Amendment rights of public employees and contractors are far from absolute. In fact, as a threshold matter, a public employee or contractor must first prove that his or her speech implicates a matter of "public concern" before a Court will invoke the protections of the First Amendment. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983) (holding that a former district attorney's speech regarding such things as of-

fice morale and travel policy did not implicate matters of public concern and limitations on such speech were not actionable in federal court); and *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) (extending *Connick* protections and limitations to independent contractors with government contracts). If the speech does implicate a matter of public concern, then the employee's or contractor's First Amendment rights depend upon the "balance between the interests of the [employee or contractor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer [or contractor], in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968) quoted in *Umbehr*, 518 U.S. at 672.

Previously, Brentwood Academy has argued that *Connick* and *Umbehr* are inapplicable to this case because "[t]he relationship between the TSSAA and its member schools is not that of employer/employee, nor is Brentwood Academy a service provider for the TSSAA." Instead, Brentwood Academy alleged, the TSSAA is nothing more than a government regulator, acting in a regulatory capacity. While possessing some surface appeal, this argument collapses upon close examination of Brentwood Academy's actual relationship with the TSSAA. Brentwood Academy is a full, voting member of the TSSAA. It has a voice in the composition of the TSSAA Board of Control and its Legislative Council and thereby has a voice in the content in the substance of TSSAA rules and regulations. Brentwood Academy officials are eligible to serve as members of either the Board of Control or the Legislative Council. In other words, far from being a mere private citizen, Brentwood

Academy is a functioning member of an (allegedly) government organization.

As a member of an alleged government organization, Brentwood Academy stands in much the same shoes as a public employee or contractor. Thus, the relevant constitutional distinction should not be between employees and members of a government organization, but between members of the government and members of the public at large. *cf., Umbehr*, 518 U.S. 668, 676. ("We have, therefore, 'consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.'") quoting *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion). As a result, unless the composition of Brentwood Academy's linebacking corps is a matter of "legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate" (*Pickering*, 391 U.S. at 571-572), then this Court is not an appropriate forum for Brentwood Academy's First Amendment complaints.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). It is not and was not intended to be used as a weapon by disgruntled members of government embroiled in purely internal policy squabbles. The First Amendment is too grandiose a vehicle for Brentwood Academy's single-minded drive to the recruiting promised land.

C. Alternatively, Brentwood Academy's Recruiting Activities Constitute, At Most, Commercial Speech. The Recruiting Rule Is A Proper Limitation On That Speech.

The District Court held that the Recruiting Rule did not implicate commercial speech doctrines because the rule was not limited to a school's advertisements and/or solicitations and was therefore "inextricably intertwined with otherwise fully protected speech." *Brentwood Academy*, 13 F. Supp. 670 at 691 fn. 21. Because the ban included communications that merely "conveyed information" and also applied to coaches of public schools, the District Court concluded that the ban did not limit "purely commercial speech." However, such a rigid application of commercial speech definitions is at odds with recent decisions of this Court.

In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), the plaintiffs, a company and individuals who threw "tupperware parties" in students' dormitory rooms, challenged a University rule that prohibited private commercial enterprises from operating on University campuses other than to provide certain specified services. 492 U.S. at 471-472. The plaintiffs argued that their "tupperware parties" were more than mere commercial speech. In addition to proposing a commercial transaction, their presentations touched on other subjects, such as how to be financially responsible and how to run an efficient home. *Id.*, at 474. As a result, the plaintiffs claimed, pure speech and commercial speech were "inextricably intertwined" and the entirety must, therefore, be classified as noncommercial. *Id.*

The Court disagreed, noting that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole" and the effect of the challenged regulation thereon. *Id.* Including the home economics elements into the tupperware parties "no more converted [plaintiffs] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Id.*, 474-475. When the speech at issue in this case is "taken as a whole", it becomes clear that the Recruiting Rule clearly implicates only commercial speech. First, and most obviously, recruiting by a private school necessitates the proposal of the "commercial transaction" of tuition payments. Even when scholarships are involved, commercial transactions take place. The furnishing of thousands of dollars of tuition money to an individual who may later generate tens of thousands of dollars of gate receipts and tournament winnings to a member school is most certainly a commercial transaction. To say otherwise simply denies the stark reality of the purpose of private high school athletic scholarships.[3]

Additionally, the furnishing of practice information in connection with recruiting no more converts recruiting to pure speech than the furnishing of product delivery information after the purchase of mail order goods converts a sale to pure speech. In fact, one would be hard-pressed to think of a single example of a consummated commercial transaction in which the *only* speech that occurs is the proposal. The TSSAA's Recruiting

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[3] Similarly, the act of inducing a star athlete to uproot, move and change public schools is laced with commercialism. Public schools, just like private schools, can generate vast sums of money from successful sports teams.

Rule is not "inextricably intertwined" with pure speech. Rather, even innocuous-seeming, recruiting-related "informational" speech is undeniably commercial at its heart.

Once speech is identified as commercial, the lawfulness of restrictions on that speech is analyzed as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Fox, 492 U.S. at 475 quoting *Central Hudson Gas & Electric Corp. v. Public Services Comm'n of New York*, 447 U.S. 557, 566 (1980).

Recruiting concerns the lawful activity of high school athletics, and, for the sake of argument, we will assume that all of Brentwood Academy's recruiting activity is not misleading. Moving to the next step of the analysis, it is clear that the government interests served by the Recruiting Rule are significant. The District Court properly noted that the state has a "compelling interest in preventing conduct that is harmful to the student-athlete." *Brentwood Academy*, 13 F. Supp. 670 at 691. Additionally, the state, when conducting and overseeing athletic endeavors, certainly has an

interest in establishing as fair and level a playing field as possible.

The Recruiting Rule, by banning "undue influence" on a student to secure or retain that student for "athletic purposes" and by preventing students from being "singled out" on the basis of athletic ability, advances the TSSAA's legitimate, significant interests. When the Recruiting Rule is followed, athletic recruiting is essentially nonexistent and teams are able to compete on their own merits. More importantly, children and their parents are spared from the exploitation, high-pressure tactics and unrealistic expectations that often accompany recruiting activities by schools such as Brentwood Academy.

Finally, the Recruiting Rule, while extensive in its regulation of any conceivable recruiting activity, is no more extensive than is necessary to protect government interests. As has been stated repeatedly above, the Recruiting Rule targets athletic recruiting only. Schools remain free to reach out and "sell" their schools to prospective students for any other purpose – spiritual, academic, or otherwise. Schools merely need to take care that the only students they reach out to do not also just "happen" to run the 40 yard dash in 4.3 seconds.

IV. CONCLUSION

This Court should not permit Brentwood Academy to improperly wrap its single-minded quest for athletic fame and fortune in the cloak of the First Amendment. Brentwood Academy cannot "have it all." It must choose between compliance with narrow regulations that are within the scope and mandate of an organization it

chose to join and the unfettered freedom (but diminished glory) of an independent existence. For all of the foregoing reasons, even if this Court holds that the TSSAA is a state actor, it should find that the TSSAA has not violated Brentwood Academy's First Amendment free speech rights. The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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ON BEHALF OF RESPONDENTS

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually

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STATEMENT OF ISSUE PRESENTED

The issue addressed in this brief is whether the Tennessee Secondary Schools Athletic Association ("TSSAA") and other similar private, interscholastic associations are "state actors" when operating their respective associations in their respective states.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, similar to the TSSAA, are private, voluntary interscholastic (as opposed to intercollegiate) associations. While the structure of each of the *Amici* may vary slightly, each shares significant key traits with the TSSAA which renders the present case of critical importance to their historical status as private associations subject to contract and other laws of their respective states. Were the decision of the Sixth Circuit reversed, a consequence would be a drastic alteration of the law of each state as that law pertains to the authority and status of each *Amici*. If the Sixth Circuit decision is affirmed, the decision will provide clear guidance in all states in connection with disputes arising between and among the private school and public school members of each voluntary association relative to the enforcement of the rules of each such association. Affirmance will result in the treatment of interscholastic associations like all other private associations under state law, consistent with and pursuant to the terms of the constitution, by-laws or other organizational agreement of each association, freely adopted by and between the member entities.

SUMMARY OF ARGUMENT

The TSSAA does not act under color of state law because interscholastic associations do not perform a public function traditionally and exclusively reserved to the state, the state does not control or coerce the conduct of interscholastic

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no person or entity other than the *Amici,* their members, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored the brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a).

associations, the state is not legally responsible for the conduct of most interscholastic associations, and there is no symbiotic relationship between the state and interscholastic associations. In other words, it cannot be rationally argued that the *Blum Trilogy* presents law which is unclear or supports a finding of state action. Petitioner and its *Amici* instead believe there is state action in this case based almost exclusively on their finely parsed reading of one of the sentences in *Tarkanian* footnote 13 (the other sentence plainly militates against state action). However, *Tarkanian* footnote 13 does not answer the question of whether a private association of schools is a state actor, it foresees the question. There may be instances where an interscholastic association is a state actor, such as where the association is an explicit structural arm of state government. However, where the association has no such characteristic—like the TSSAA—but is a purely voluntary association independent of state control, oversight, regulation, funding, etc., there is absolutely no basis to find it a state actor under this Court's precedent.

ARGUMENT

I. STRUCTURE AND FUNCTION OF TSSAA.

The structure and function of the TSSAA should determine whether this Court finds it to have been a state actor when it enforced its democratically adopted "Recruiting Rules" against a private member, Brentwood Academy. Examination of how an association came to exist, and under what authority it acts under its state law, is essential to this determination. What a private association such as the TSSAA is and what it is not, what it does and what it does not do, and what it can and cannot do, are necessarily dispositive in analyzing whether the association is a state actor or acted under color of state law for purposes of 42 U.S.C. § 1983 in the case *sub judice*.

A. Analysis of TSSAA and Interscholastic Associations.

It is thus significant for this court to consider that not all interscholastic associations are the same. While some interscholastic associations have a significant level of state involvement, most have virtually no involvement with the state, and no more than any person or corporation may have by doing business with an agency of the state. The first class of associations are created by state statute, as in California and Texas, or exist pursuant to the express authority of the legislature, as in Iowa and Kansas. (See Appendix A attached hereto). Most associations, like the TSSAA, are not created by state statute and the Association's authority is not granted by the legislature in any way. The TSSAA, like many other such associations, is not created, governed, operated, funded, or controlled by a state department of education. That absence of control is to be compared with the states of Alaska and Maryland, which are governed, or to some extent controlled, by a state board of education. (Appendix A). Clearly, where the legislature of a state has deemed state involvement in interscholastic competition to be necessary, those states have enacted legislation to bring such activities under the aegis of the state to the extent each deems appropriate. Conversely, the right of states such as Tennessee to keep such activities separate from the state should not be undermined.

In some states, including Tennessee and *Amici*, the state legislature does not grant authority to the Association. Other states' codes, including Arizona and Minnesota have some recognition even though control is absent. With regard to state funds, most associations do not receive any of their annual revenue directly from the state. In fact, certain *Amici*, such as the Illinois Association and Michigan Association do not even charge an annual membership fee. By contrast, Delaware and the District of Columbia do receive revenue directly from the state government. (Appendix A.)

Certain other basic characteristics of the TSSAA should also be factored into the state action analysis. The TSSAA, like all of the *Amici* and many other interscholastic associations, are private, not for profit, tax exempt organizations (26 U.S.C. § 501(c)(3)) which have as one of their primary goals the development of rules for fair and equitable participation in interscholastic activities. *Amici's* members, like the TSSAA membership, are comprised of private, parochial, and public high schools located throughout each state, all of which voluntarily join the associations. In some states a member school is even located in an adjoining state[2] and in all states, the member schools compete against schools in adjoining states. No high school, public or private, is required to become a member, and not all schools are members of their state's association.[3]

All of the member schools of the TSSAA like the members of all *Amici*—private, parochial and public—adopt by majority vote a constitution and a set of by-laws and competition rules which govern interscholastic competition among their voluntary members. The reason for this is to have a uniform set of regulations to create a level playing field when one member plays a contest against another member. The TSSAA and these *Amici* do not administer any aspect of the state's mandated educational curriculum, including physical education. The by-laws ultimately adopted by the member schools are discussed on a national level through private entities such as the National Federation. The play-

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[2] In fact, a school located in Kentucky is a member of the TSSAA. Several schools in California belong to the Nevada association. Nearly every state crosses borders in competition between schools and North Dakota even has members from Canada.

[3] For instance, there are at least 28 schools which are not members of the Illinois High School Association, 30 schools which are not members of the Ohio High School Athletic Association, and 30 public and private schools in Louisiana which are not members of the Louisiana High School Athletic Association.

ing rules, likewise, are developed with the assistance of independent agencies, such as the United States Olympic Committee and the National Collegiate Athletic Association, in a given sport. The by-laws for interscholastic competition in all states are similar and routinely discussed so that a student moving from one state to another or a team from one state competing against a team from another state know that they are participating and playing under similar if not identical participation and conduct rules.

The cooperative efforts of the state, national and international organizations result in by-laws and other sports rules which govern competition sponsored and administered by the interscholastic association, with the association in each state maintaining its autonomy. Each school which is a member of the association has equal representation in the association's activities. Each private and public school in Tennessee (as in other *Amici* states)—including Brentwood Academy—has an equal voice in its Association's governance. Because of this voluntary participation, representation, and governance, it is well established that judicial review of a private association's conduct is available through the state courts subject to whether the association exercised its powers consistently with its own internal rules,[4] in a non-arbitrary or capricious manner. *See e.g. Kirby v. The Michigan High School Athletic Association,* 585 N.W. 2d 290 (Mich. 1998); *Kansas State High School Activities Association*, 917 P. 2d 836 (Ks. 1996); *Robinson v.*

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[4] There are some who have attempted to modify the issues in this case to promote their single minded agendas by raising concerns of school choice, sex discrimination and Title IX, race discrimination, voting rights, and potential remedies against state interscholastic associations outside the state courts. While their participation and advocacy for their particular cause is admirable, the arguments raised in their briefs are simply not at issue. This case does not address, pertain to, or affect parental choice of schools, Title IX, voting rights or discrimination. Rather, the issue before this Court is whether the TSSAA acts under color of state law.

Illinois High School Association, 195 N.E.2d 38 (Ill. App. Ct. 1963); 6 Am.Jur.2d, Association and Clubs, § 8, p. 399 (1999).

The board members of the TSSAA and *Amici* are elected from the membership as a whole. Each board member then represents all private, parochial and public schools in his or her region or even statewide. Contrary to Petitioner's brief, the board members do not represent their individual school when serving on the board and exercise no authority of or granted by their school. (Pet. Brief, p. 48). Moreover, board members are not acting as agents of their school employers when serving on the board of directors, but instead are acting as private citizens.

The board members can be and often are elected from private schools.[5] It is simply happenstance that at the present time the board members of the TSSAA are from public schools. The rules and regulations of the TSSAA, like *Amici,* are therefore not administered by the public school component of the Association's membership but by individuals representing public and private schools alike. For example, under the Illinois High School Association Constitution and By-laws, like that of the TSSAA, the executive director and the staff are vested with the duty and authority to determine whether a member school and/or individual student is in compliance with the by-laws. The executive director is selected by a board of control which board is elected by **all** members, each of which may nominate and elect its principal or other representative, including non-public employees, clergy or the religious head of the school, to the board. There is no requirement that the executive director or staff of the association or any board member be

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[5] At the present time there are board members from private and parochial schools on the Georgia, Hawaii, Idaho, Louisiana, Michigan, Ohio, Wisconsin, and Wyoming associations, among others with some such positions guaranteed by the governing contract of the associations.

a public employee. Indeed, the executive director of the TSSAA is a private citizen, not a state employee, and has no voting rights on the Board.

The mere fact that an interscholastic association is composed of a majority of public members does not convert it to a state actor; it simply means there are more public schools than private schools desiring to join such an association. While the public school component of the TSSAA may be one factor for consideration as pointed out in *Tarkanian* footnote 13, it is not the talisman of state action analysis under the *Blum* Trilogy. See part II, *infra*. If it were, the result for many private athletic associations, including the Amateur Athletic Union, National Collegiate Athletic Association, USA Hockey and others would be incongruous. It may also serve to indirectly elevate athletics to fundamental right status in direct contravention of the uniform consensus of federal and state courts (See footnote 8, *infra*), and open the floodgates to the federal courts for students who feel they have been wronged by one of the thousands of eligibility decisions made annually by interscholastic associations.

It is therefore evident that *Tarkanian* footnote 13 foresaw, but did not answer the question of whether an association of public and private schools is a state actor. Otherwise, it would be necessary to confront the seemingly contradictory first and second sentences of the footnote. This appears to be recognized by Petitioner and many of its *Amici*, including part IV of the *amicus curiae* brief of the Tennessee Lawyers' Association For Women, wherein they struggle to solve the apparent incongruity. However, they fail to recognize the most rational explanation of the footnote—this Court was not deciding the issue because the issue was not before it. As a result, there is nothing whatsoever contradictory about the footnote. The court decisions relied upon by Petitioner and its *Amici* simply rely upon the first sentence of footnote 13 without any regard for or analysis of the second sentence or the issue of state actor

status as this Court analyzed the question in the body of the *Tarkanian* opinion. (See footnote 7, *infra*.)

B. Brentwood Cannot Avoid its Agreement to Abide by TSSAA Rules.

In the TSSAA, private schools enjoy equal status to public schools. Each member school has identical legislative and identical elective rights, regardless of the size or location of the school or whether the school is public or private. By joining, the rules of the association become the rules of each member school agreed upon by the members schools. Thus, when Brentwood joined the association, which it was not mandated to do, it agreed to abide by the Recruiting Rule here in question. All schools, including Brentwood, benefit equally from the rules. It is therefore disingenuous for a member school to now complain about the rules it voluntarily accepted and participated in forming simply because it was found to have violated those rules in a given instance.

The member schools of the *Amici* have adopted recruiting rules similar to that of the TSSAA. Like the other rules of the associations, the Recruiting Rule is rationally designed to address genuine concerns of the membership, such as discouraging the exploitation of students; providing maximum opportunity for all students to participate; discouraging adults from jeopardizing a student's eligibility; preventing the misuse of athletic programs; preventing district hopping; discouraging school selection for solely athletic reasons; maintaining a competitive balance among member schools and their students; preventing recruiting abuses; preventing red-shirting;[6] ensuring equality of competition between member schools; and, ensuring that sports do not

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[6] Red-shirting is not permitted at this level of competition. Red-shirting, or the holding back of an athlete so that they compete at a more mature age, is a useful recruiting tool.

assume greater importance than academics. In short, at the high school level recruiting is not regulated—it is prohibited. As a means of addressing these concerns, such rules have been developed and are administered in a framework completely free of regulation or interference by the state. To alter this well established framework would result in detriment to not only the Association's members and their rights of free association and contract, but more importantly the interests of individual students.

There is also a possible misconception concerning the extent of the involvement of the TSSAA and *Amici* in the athletic and other extracurricular events in which schools and students choose to participate. During the vast majority of the school year, member schools compete among themselves under nationally recognized contest rules, but pursuant to their individual scheduling choices throughout a particular activities' season. The TSSAA and *Amici* are not involved in those events, do not run those events, do not sponsor those events, and do not control those events or receive any revenue from those events. Rather, the only events controlled by the TSSAA and *Amici* are the end of season tournaments: here, the association statewide football tournament. As a result, the overwhelming majority of athletic and other extracurricular events take place outside any control of the interscholastic association, while eligibility is subject to the rules if that school wishes to participate in association post season tournaments.

C. The Location of Association Sponsored Competition Does Not Make the Association a State Actor.

An activity common to the TSSAA and the *Amici* is the organization of tournaments. The location of such tournaments varies from the gymnasia of member schools to fieldhouses of public and private universities to private facilities, such as the Carver Arena in Illinois, the Super Dome in Louisiana, Vanderbilt University in Nashville, and num-

erous other private tennis and golf clubs. When an association conducted event (i.e. a tournament) is held at the location of a member school—whether it be a private, parochial, or public school—the association contracts with the member school to use the facility, just like any other private party using the school facility, and a rental charge or percentage of gate receipts is paid to the school by the association. In a rare instance, a local school board may decide to offer its facility rent-free, but even then some financial accommodation is made for use of the facility. Petitioner's attempt to place reliance on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) is therefore completely misplaced (see part II, *infra*).

In sum, the structure and function of the TSSAA and *Amici* do not support a finding of state action under the factors traditionally analyzed by this Court. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); and *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). In light of the above-mentioned characteristics, these private and voluntary associations are not state actors simply because some, albeit even a majority of their members, are public schools.

II. THE TSSAA IS NOT A STATE ACTOR UNDER THIS COURT'S PRECEDENT.

At the outset, it is important to recognize the distinction between "state action" which is proscribed by the Fourteenth Amendment and "private conduct" which is not so proscribed. This distinction remains deeply embedded in constitutional law and first emanated from early decisions of this Court, *United States v. Cruikshank*, 92 U.S. 542, 554-555 (1875); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) and the *Civil Rights Cases*, 109 U.S. 3, 11 (1883). As a "fundamental fact of our political order", this Court has warned that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by

limiting the reach of federal law and federal judicial power," *Lugar v. Edmundson Oil Company*, 457 U.S. 922, 936-937 (1982) and that "courts must consider from time to time where the governmental sphere ends and the private sphere begins," *Edmonson v. Leesville Concrete Company*, 500 U.S. 614, 620 (1990). Thus, the Constitution permits citizens to "structure their private relations as they choose," *Edmonson*, supra at 619. Petitioner acknowledges these important principles [See Petitioner's Brief at p. 19-21].

No state action inquiry of the TSSAA should proceed without regard for the outer boundaries and defined contours of proper state action analysis restated by this Court in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) and *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). These cases, commonly referred to as the "Blum Trilogy", contain bedrock principles that were intended to guide federal courts in determining when private actions may or may not be fairly attributable to the state to constitute state action. The Court of Appeals Opinion, 180 F.3d 758 and the Order Denying Rehearing En Banc, 190 F.3d 705 were consistent with these principles and the District Court decision was not, 13 F. Supp. 2d 670.

Petitioner and several of its *Amici*, contend that there is a consensus of opinion nationwide that state interscholastic associations are state actors. A review of the cases cited, however, reveals that such an assertion is unwarranted. In several cases cited there is no discussion whatsoever of the state action question.[7]

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[7] *See Alerding v. Ohio High School Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985) (finding in favor of the association on other grounds without considering state action); *Crane v. Indiana High School Athletic Ass'n*, 975 F.2d 1315 (7th Cir. 1992) (decided on state law, rather than constitutional, grounds); *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121 (3d Cir.

(continued...)

A. The TSSAA Does Not Perform A Public Function Traditionally and Exclusively Reserved to the State.

Turning first to the public function test, the TSSAA is not a state actor if the public functions it performs are not **traditionally and exclusively** the State's prerogative, *Blum v. Yaretsky*, 457 U.S. 991 at 1005, 1011-1012 citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 353 (1974) and *Rendell-Baker v. Kohn*, 457 U.S. at 842. To prevail on this theory, a plaintiff must show more than the performance of a public function, but that the function is one "exclusively reserved" to the State. *Perkins v. Londonderry Basketball Club*, 196 F3d 13 at 19 (1st Cir. 1999).

In *Blum v. Yaretsky*, supra, this Court declined to find state action under the public function test because it found that the administration of a nursing home was not such a public function **traditionally** and **exclusively** reserved to the sovereign, 457 U.S. at 1011-12 (emphasis added). Likewise, in *Rendell-Baker v. Kohn*, supra, this Court declined to declare the private operator of a school for maladjusted high school students a state actor for similar reasons holding that such public services were not the "exclusive province of the State." 457 U.S. at 842. *See also, Edmonson*

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[7] (...continued)
1978) (state action not an issue in appeal). Many cases simply state that the association is a state actor with little or no analysis of the issue, often citing only to *Tarkanian*, *See, e.g., Brewer v. Purvis*, 816 F. Supp. 1560, 1575 (M.D. Ga. 1993); *Libby v. South Inter-Conference Ass'n*, 728 F. Supp. 504, 506 (N.D. Ill. 1990); *Robbins v. Indiana High School Athletic Ass'n*, 941 F. Supp. 786 (S.D. Ind. 1996). Many which applied some state action analysis to determine the issue, were decided prior to the *Blum* trilogy. *See, e.g., Brenden v. Independent School Dist. 742*, 477 F.2d 1292 (8th Cir. 1973); *Kelley v. Metropolitan County Bd. of Educ. of Nashville and Davidson County, Tenn.*, 293 F. Supp. 485 (M.D. Tenn. 1968); *Louisiana High School Athletic Assoc. v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968).

v. Leesville Concrete Company, 500 U.S. at 624 (holding that a jury is a "quintessential governmental body" which performs "critical governmental powers"). As observed by Justice O'Connor in her dissenting opinion in *Edmonson*, state action under the public function doctrine requires that the "conduct must not only comprise something that the government traditionally does, but something that **only** the government traditionally does." 500 U.S. at 640.

It is settled law in this Court that "neither the conduct nor the coordination of amateur sports has been a traditional governmental function." *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 at 545 (1987). In accord with *San Francisco Arts & Athletics*, Id. and *NCAA v. Tarkanian*, 488 U.S. at 197-198 n. 18 (1988) (holding that the function of fostering amateur athletics at the college level is by no means a "traditional, let alone exclusive state function"), are *McCormack v. NCAA*, 845 F.2d 1338, 1346 (5th Cir. 1988) (coordination and oversight of intercollegiate athletics may serve a public purpose, but hardly a function traditionally reserved exclusively to the state; and *Ponce v. Basketball Federation of the Com. of Puerto Rico*, 760 F.2d 375, 381 (1st Cir. 1985) stating:

> If education is not traditionally an exclusive function of the state *id.*, then *a fortiori,* neither is the regulation of amateur sports. Amateur sports groups commonly receive assistance from the state in the form of state-maintained or state-operated playing fields, but that it has traditionally been the state's sole province to decide the number of teams, the range of sports, eligibility requirements and many other details is not a supportable assertion. That the state or municipality may assist the cause of amateur sports, through regulation or financial support, does not make the state's role one traditionally and exclusively reserved to it. *Arlosoroff v. National Collegiate Athletic Association*, 746 F.2d 1019, 1021 (4th Cir. 1984).

Underscoring the proposition that extracurricular high school athletics is not a traditional function nor the **exclusive prerogative** of the state is a virtual avalanche of state and federal cases generally holding that there is no "fundamental right" to play high school athletics protected by the Fourteenth (14th) Amendment to the U.S. Constitution.[8]

In its state action analysis below, the District Court in this case made no factual or legal finding that either the conduct or coordination of amateur athletics was a public function **traditionally** and **exclusively** reserved to the state. *See* 13 F. Supp. 2d 679-685. Instead, the District Court merely referred to education as a "traditional function of the state" and extracurricular activities as an "important component of an education in today's modern society." 13 F. Supp. 2d at 685 citing another Pre-*Blum* district court in *Barnhorst v. Missouri State High School*

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[8] *Walsh v. Louisiana High School Athletic Ass'n.*, 616 F.2d 152, rehearing denied, 621 F.2d 440 (5th Cir. 1980); *Mitchell v. Louisiana High School Athletic Ass'n.*, 430 F.2d 1155 (5th Cir. 1970); *Sullivan v. University Interscholastic League*, 599 SW2d 860 (Tex. Civ. App. 1980); *Blue v. University Interscholastic League*, 503 F. Supp. 1030 (N.D. TX. 1980); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976); *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315 (6th Cir. 1985); *Bucha v. Illinois*, 351 F. Supp. 69 (N.D. Ill. 1972); *Herbert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981) affirming Rhode Island Supreme Court at 480 A2d 403 (1984) deciding same question under Rhode Island State Constitution; *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975); *Kulovitz v. Illinois High School Ass'n.*, 462 F. Supp. 875 (N.D. Ill. 1978); *Jones v. Oklahoma Secondary Schools Activities Ass'n.*, 453 F. Supp. 150 (W.D. Okla. 1977); *Moreland v. Pennsylvania Interscholastic Athletic Association*, 572 F.2d 121 (3d Cir. 1978); *Paschal v. Purdue*, 320 F. Supp. 1274 (S.D. Fla. 1970); *Taylor v. Alabama High School Athletic Association*, 336 F. Supp. 54 (N.D. Ala. 1972); *Niles v. Texas University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983) and *Oklahoma High School Athletic Association v. Bray*, 321 F.2d 269 (10th Cir. 1963).

Activities Association, 504 F. Supp. 449 (W.D. Mo. 1980). Even though the District Court below was fully aware of this Court's decision in *Blum v. Yaretsky*, 13 F. Supp. 2d at 679, it refused to follow this Court's directive in *Blum* that state action cannot be established under the public function test unless the public function is one **traditionally** and **exclusively** reserved to the state. *Blum v. Yaretsky*, 457 U.S. at 1011-12. Moreover, the District Court and Petitioner totally ignored this Court's decision in *San Francisco Arts & Athletics v. U.S. Olympic Committee*, *supra*, (neither the conduct nor coordination of amateur sports is even a traditional governmental function). The Sixth Circuit was obviously not fooled by this approach to the issue.

In its Brief before this Court, the Petitioner engages in the same slight of hand approach as the District Court describing athletics as an "important component of education in today's modern society" (Petitioner's Brief, p. 14-15) and "an integral component of the state's educational system" (Petitioner's Brief, p. 35). Thus, by ignoring "exclusive prerogative of the state" the Petitioner invites this Court's return to Pre-*Blum* analysis of state action which has been described as a "conceptual disaster area." Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harvard L. Rev. 69 at 95 (1967). The Petitioner's Brief before this Court is totally devoid of any argument that state action can be found here under application of the public function test, and the silence is deafening. The Petitioner appears to have abandoned any hope of sustaining state action under the public function test within the strict guidelines recognized by this Court.

B. The State of Tennessee Is Not Legally Responsible For The Challenged Conduct of The TSSAA.

Constitutional standards cannot be invoked on a private party unless it can be said that the state is "**responsible** for the specific conduct of which the plaintiff complains."

Blum v. Yaretsky, supra, 457 U.S. at 1004. A state cannot be held responsible for a private decision unless it has "exercised coercive power or provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, supra, 457 U.S. at 1004. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment," *Blum v. Yaretsky*, supra, 457 U.S. at 1004-1005 (citations omitted). The fact that a private party is subject to extensive regulation by the State does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. *Blum v. Yaretsky*, supra, 457 U.S. at 1004 citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The receipt of public funds does not make one a state actor. *Rendell-Baker v. Kohn*, 457 U.S. at 840 citing *Blum v. Yaretsky*. Performance of a public contract does not make one a state actor, *Rendell-Baker v. Kohn*, 457 U.S. at 840-841. And it is not enough even if individual members of an athletic association, acting collectively with non public members, are themselves public institutions which could be classified as state actors. *NCAA v. Tarkanian*, supra, 488 U.S. at 191-199 (1988).

Petitioner here cannot prevail because it cannot show that the TSSAA Recruiting Rule in particular was compelled or influenced by state regulation. Despite extensive regulation of the school under review in *Rendell-Baker v. Kohn*, this Court held that the discharges of petitioners there were not compelled or influenced by any state regulation. 457 U.S. at 841. Likewise, in *Blum v. Yaretsky*, it could not be shown that the discharge or transfer of particular patients receiving Medicaid benefits was influenced or required by state regulations. 457 U.S. at 1005. There is absolutely no record in this case that the TSSAA Recruiting Rule was compelled, required or influenced by any official

action of the State of Tennessee.[9]

Petitioner also argues erroneously that the extracurricular amateur athletic program operated by the TSSAA is part of the free public education mandated by the Tennessee Constitution, Article XI, Section 12 [Petitioner's Brief p. 8, 39, 42, 43]. Courts deciding the outer boundaries of state constitutional provisions requiring free public schools for the gratuitous instruction of all citizens below a certain age do not create a "state entitlement" for participation in "extracurricular athletics." See *State ex rel. Indiana High School Athletic Association v. Lawrence*, 162 N.E.2d 250 at 255 (Ind. Sup. Ct. 1959) holding that Article 8, Section 1 of the Indiana State Constitution requiring common schools to impart knowledge and learning without charge did not extend to "extracurricular activities;" and *Smith v. Crim*, 240 S.E.2d 884 at 885 (Ga. Sup. Ct. 1977) holding that provisions of Georgia law requiring tuition-free education for all children six to nineteen years old did not include "extracurricular" sports; and *Berschback v. Grosse Point School District*, 154 Mich. App. 102 (1986) at 117-118 holding:

> Although Michigan law may, through its compulsory education statute, create a protected interest in public education, this protected interest in public education does not extend to a student's participation in interscholastic sports. . . . The compulsory education statute may create a protected, legitimate claim of entitlement to basic classroom attendance, but, alone, it does not create a legitimate claim of entitlement to participation in interscholastic athletics.

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[9] However, it is noteworthy that the headmaster of a private independent school authored some of the printed guidelines used for understanding and interpreting the TSSAA Recruiting Rule while serving as Vice President of the TSSAA Legislative Council [See Respondent's Brief, Statement of the Case].

Thus, courts distinguish between that which is "curricular" and that which is "extracurricular" in defining the outer limits of what public schools are mandated to provide their citizens under state constitutions. The Petitioner is obviously trying to blur the distinction between physical education programs offered within the mandated curriculum of schools and extracurricular activities of which neither Petitioner nor its *Amici* make any mention of or distinction between, preferring to further blur the lines of distinction. There is a distinct difference because state constitutions do not mandate extracurricular forms of education, though hopefully students learn from their experience, including the obligations to comply with reasonable and necessary rules.

Petitioner abandons in its Brief any argument that the TSSAA Recruiting Rule was adopted or enforced against Petitioner by the State of Tennessee through the exercise of "coercive power," *Blum*, supra, 457 U.S. at 1004. Instead, Petitioner argues that the State of Tennessee provided "significant encouragement" [Petitioner's Brief p. 48-50]. Does the Petitioner do this because it cannot make a case for the exercise of "coercive power" and views the "significant encouragement" test as a lower standard? To the contrary, "significant encouragement" must be read with "coercive power" and cannot support a determination of state action unless the choice must in law be deemed to be that of the state. *Blum*, supra, 457 U.S. at 1004.

The Petitioner is completely and utterly wrong when it argues that the TSSAA "simply could not exist" without the "overt, significant participation of the government" [Petitioner's Brief p. 49]. The TSSAA came into existence in 1925 and exists today through the free exercise of a contract between private, parochial and public school members and not through the coercion or significant encouragement of any Tennessee constitutional provision, statute or governmental regulation. The TSSAA exists, but does not receive any direct subsidy from public tax funds and generates

almost all of its entire operating budget from gate receipts at playoffs and championship tournaments [Respondent's Brief, Statement of the Case]. The TSSAA exists, but membership is voluntary without any state coercion or encouragement. The TSSAA exists, but no accreditation criteria for any public or private school in the State of Tennessee requires membership in the TSSAA. The TSSAA exists, but no wages or retirement benefits of the TSSAA Executive Director or any TSSAA staff are paid by the State of Tennessee. The TSSAA exists, but no decisions by the TSSAA Board of Control or Legislative Council are directly appealable to any government agency or state judicial body with plenary authority to overrule or change the same ouside the common law of Tennessee. The TSSAA exists, but is not dependent on the rent free use of public facilities for its playoffs or championships while paying rent for public and private facilities and holding many of its championship events at private institutions (i.e., state football championship at Vanderbilt University). The TSSAA exists, but does not occupy a public building at taxpayer expense for its executive offices. The TSSAA exists, but does so without any direct regulation of the Tennessee State Board of Education. The TSSAA exists, but does not enjoy or exercise state power to subpoena witnesses, impose contenpt citations or exercise sovereign authority over any individual apart from its contractual authority over member schools. And finally, the TSSAA exists, but does not enjoy sovereign immunity from civil lawsuits. While one must admit that TSSAA programs, budget and activities would be substantially smaller if public schools withdrew from TSSAA membership, it would not cease to exist.

Reduced to simple expression, Petitioner chiefly argues that state action must be sustained simply because the TSSAA Board of Control and Legislative Council **at the time of enforcement** consisted of administrators from public schools. However, the Petitioner fails to recognize that these administrators were not **sent** to their positions

with the TSSAA based upon the unilateral actions of their respective school boards, but were individuals selected and called to serve upon a vote in which all private, parochial and public school members of the TSSAA voted. One must only assume that Petitioner operates from an erroneous belief or a belief not supported by evidence in the record below, that no private school member would ever vote for a public school administrator and vice versa.

It is not enough to simply point to the involvement of public school administrators on the TSSAA Board of Control and Legislative Council, but Petitioner must show that the professional judgments or decisions of these athletic administrators to adopt and/or enforce the TSSAA Recruiting Rule were required or influenced by the State of Tennessee. *See Blum v. Yaretsky*, supra, (citing *Polk County v. Dodson*, 454 U.S. 312 (1981) and stating that those decisions ultimately turn on professional judgments made by private parties based upon professional standards that are not established by the State). (457 U.S. at 1008-1010).

As recognized by the Fifth Circuit U.S. Court of Appeals in *McCormack v. NCAA*, 845 F.2d 1338, 1345-1346 (1988), substantial or even pervasive involvement of state funded public schools in an organization which coordinates amateur athletics is not enough alone to meet the test of state action under *Blum v. Yaretsky* and *Rendell-Baker v. Kohn*, even when, as in *McCormack*, all but one member was from the same state in the conference. Otherwise, thousands of private parties and associations doing business with a public school would arguably also become state actors.

The involvement of the State of Tennessee in affairs of the TSSAA is far less extensive than the government in affairs of the United States Olympic Committee which were reviewed by this Court in *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987) (congressionally granted charter to U.S.O.C. and exclusive use of word "Olympic," congressional regulation of U.S.O.C. and direct funding of U.S.O.C. by the government).

Neither the defacto nor dejure relationship of the Tennessee State Board of Education (SBE) to the TSSAA appears anything more than mere approval or acquiescence and that, simply put, is not enough, *Blum v. Yaretsky*, supra, 457 U.S. at 1004-1005. As such, the State of Tennessee would not be legally responsible for actions of the TSSAA or subject the TSSAA to the status of a state actor for the lack of coercive power over or legally significant encouragement to the TSSAA which would make its actions fairly attributable to the State. The choice here is not one compelled by the State of Tennessee, but one freely exercised by the Respondent Brentwood Academy to voluntarily belong and enjoy the benefits of TSSAA membership. The factual circumstances in each of the *Amici* states is similar and even further removed from involvement with the state than is the TSSAA, and all states would be drastically affected by the adoption of Petitioner's unsupported position, *de jure* or *de facto*.

III. THE STATE DOES NOT CONTROL INTERSCHOLASTIC ASSOCIATIONS AND THE ASSOCIATIONS DO NOT CONTROL THE SCHOOLS.

The question for review can be stated alternatively as, does the state control the interscholastic athletic association such that its actions are tantamount to state action under the Fourteen Amendment as a general uniform constitutional principal?

A. The Structure and Conduct of Interscholastic Athletic Associations Demonstrates That They Are Not State Actors Nor Subject to State Control.

Interscholastic athletic contests in the Sixth Circuit and most states are conducted in a similar fashion by interscholastic athletic associations such as TSSAA, but not all interscholastic athletic associations are identical (See Section I herein). The factual premise for the District

Court's ruling and the thesis for Judge Merritt's sole dissent, including the factual assumption of Footnote 13, *Tarkanian, supra* is that all such associations must be the same and are different than the NCAA, AAU and hundreds of other athletic associations throughout the United States. They are not, as previously presented.

As illustrated in the discussion of Section I of this brief, dissimilarity of structure of (but not the purpose of) interscholastic athletic associations in the respective states is the rule rather than the exception. That discussion shows that a few interscholastic athletic associations are creatures of state statute. The discussion also shows that some, but few, interscholastic athletic associations have been delegated their function directly by legislature or by the state board of education. (See Appendix A). Most interscholastic associations exist independent of any regulatory or oversight control by either the state legislature or any governmental agency or other entity of the state. Such is the case of the TSSAA and all *Amici* participating in this brief. Under these circumstances it is impossible to fashion an across the board classification of interscholastic athletic associations as either state actors or not state actors. Rather, the well established judicial approach to a determination of state actor status must be on an approach consistent with this Court's precedent (See Part II herein).

Many courts have suggested that the approach to the question, considering court precedent, should be on a case-by-case basis. On November 8, 1999 the First Circuit succinctly stated that a case-by-case approach to the proposition is appropriate and necessary. In *Perkins v. Londonderry Basketball Club*, 196 F.3d 13 (1st Cir. 1999) the Court states:

> "The line of demarcation between public and private action, though easily proclaimed, has proven elusive in application. As the Justices, mindful of the fact-sensitive nature of the inquiry, have staunchly eschewed any attempt to construct a universally applicable litmus

> test to distinguished state action from private conduct. Instead, they have directed lower courts to take a case-by-case approach "sifting facts and weighing circumstances so that the non-obvious involvement of the state and private conduct can be attributed its true significance." *Burton v. Wilmington Park Authority,* 365 U.S. 715, 722, 81 S. Ct. 856, 6th LED 2d 45 (1961).

In a prior opinion the Fourth Circuit, *Arlosoroff v. The NCAA,* 746 F.2d 1019 (4th Cir. 1984) stated:

> "There is no precise formula to determine whether otherwise private conduct constitutes "state action." After sifting facts and weighing circumstances, . . ." *Burton v. Wilmington Park Authority,* 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6th LED 2d 45 (1961).

"The inquiry in each case was whether the conduct is fairly attributable to the state." *Lugar v. Edmondson Oil Company,* 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 LED 2d 482 (1982).

The function of an interscholastic athletic association is to introduce some order into the conduct of interscholastic athletic programs and assistance in institutional enforcement of uniform rules of eligibility. However, the regulation of interscholastic athletics like intercollegiate athletics is not a function traditionally exclusively reserved for the state. *Jackson v. The Metropolitan Edison Company,* 419 U.S. 345, 352, 95 S. Ct. 449, 454, 42 LED 2d 477 (1975). Nor is the administration of interscholastic athletics a public function. *See Tarkanian,* 488 U.S. 197 Note 18, 109 S. Ct. 454 (discussing the NCAA's overriding function of fostering amateur athletics at the college level and noting that "while we have described that function as "critical" by no means is it a traditional let alone an exclusive state function" (citations omitted)); *San Francisco Arts and Athletics, Inc. v. U.S. Olympic Committee,* 483 U.S. 522, 545, 107 S. Ct. 2971, 97 LED 2d 427 (1987). "Neither the conduct nor the coordination of amateur sports has been a traditional governmental function." *Behagen v. Amateur Basketball*

Association, 884 F.2d 524, 531 (10th Cir. 1989); *McCormack v. National Collegiate Athletic Association,* 845 F.2d 1338, 1346 (5th Cir. 1988); *Ponce v. Basketball Federation,* 760 F.2d 375, 381 (1st Cir. 1985).

Except in those instances where the interscholastic association is either the creature of the state of explicitly subjects it to the authority of the state, neither congress nor the legislature of any state has exercised oversight or control over the rules, regulations or by-laws of an interscholastic association; or, for that matter, any other athletic association including the NCAA or TSSAA. As previously noted, most legislatures of the respective states have opted against exercising control or oversight over the interscholastic association of secondary schools of their states (Appendix A). In such circumstances the presumption and conclusion that the interscholastic association is not a 'state actor' must apply. The clear result, under court precedent, is that the broad rule of no 'state actor' status applies to interscholastic associations operating in their respective states unless (1) the athletic association is a statutory arm of government, *Perkins, supra,* or (2) the state legislature has opted to affirmatively exercise direct statutory and regulatory oversight of the athletic association. Absent such position or affirmative action there is a complete absence of state compulsion or control.

B. Some State Involvement Does Not Mean The TSSAA Is A State Actor.

Even where there is oversight by legislative action of a particular interscholastic athletic association or approval of the eligibility rules by a state agency or, in some instances, a state legislature, which is not present in Tennessee, such approval does not automatically transform the actions of that interscholastic athletic association to a state actor status. As stated in *Arlosoroff, supra*:

> "It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, the function is not one traditionally reserved for the state, there is no state action." *Rendell-Baker v. Kohn, Blum v. Yaretsky, Polk County v. Don Dodson, Jackson v. Metropolitan Edison Company, supra.* (Citations omitted).

The simple reason for this fact is that interscholastic associations do not control member institutions even when they are structured arms of government. No athletic association in the country, regardless of structure, can dictate to its member institutions what extracurricular activities the member institution is to sponsor. No athletic association has control over a member institution's budget. No athletic association can dictate the use of member institution's facilities. No interscholastic association has independent authority over any member institution or their students. Not one law in any state of this nation requires a high school to be a member of an interscholastic association. What then is the nature of the control exercised by an interscholastic association?

Every private association in this country, regardless of structure, is first and foremost voluntary. No institution is required by any law to form an athletic team or participate in any particular program. No institution is required by any law to place any athletic team in any interscholastic competition, much less tournament competition. No law requires any institution of any state to belong to an athletic association. If an institution chooses to field a team and if the institution further chooses to allow that team to participate in interscholastic competitive athletics, that institution may choose to apply for membership in an association consisting of other institutions who support like competition. The price of admission is that the respective institutions agree to play not only by the same rules of the game, they agree upon the eligibility rules, such as a recruiting rule, for members and participants as minimum standards. The

member institutions are always free to require higher standards than the minimum set forth by the consensus of the membership.

Every rule of a voluntary association is but a statement of the consensus of the opinion of the membership set forth to establish minimum standards so that athletic competition, which is adversarial by nature, can occur on a somewhat level playing field to accomplish the goal of participation in a reasonably equitable competitive environment. To that end, every association serves the common needs of member institutions for regulations of athletics while correlating their diverse interests. Regulations are adopted not as a result of governmental compulsion but in the service of the common interests of the voluntary members. *Anderson v. IHSAA,* 669 F.Supp. 719, 728 (S.D. Ind. 1988).

Not all control is tantamount to state compulsion or state action. The concept of control must not be confused with the concept of coordination of conduct to achieve uniform eligibility rules in voluntary competitive athletics which is an adversarial undertaking by definition. Athletic associations can only enforce a set of rules which the contestants have handed them by mutual voluntary agreement. This agreement does not come from the state and the only available means of enforcement is contractual. The theory of state control or state delegation of authority and the functions of athletic associations are discussed in two cases in the United States.

The first case was decided by the Supreme Court of Kansas in 1996. In *Robinson v. Kansas State High School Activities Association*, 917 P. 2d 836, 844-46 (1996), the court analyzed the nature of an athletic association as follows:

> "The relationship of a voluntary association with its members is governed by contract law. *Cunningham v. Independent Soap and Chemical Workers,* 207 Kansas 812, 818, 486 P. 3d 1316, cert. denied 404 U.S. 985, 92 S. Ct. 453, 30 LED 2d 369 (1971).
>
> * * *

> Nothing compels a high school to join KSHSAA or refrain from withdrawing its membership, if the school is willing to accept the consequences, however unpalatable. Schools are not required to have an interscholastic athletic program.
>
> * * *
>
> "How can the schools organize themselves in interscholastic competition unless they all agree to play by the same rules? How can an individual school board adopt its own rules for interscholastic competition and how to find other schools willing to compete, if each school has difference rules? How is the sport, debate, or music event played out, if each team or group brings along not only its own ball, debate topics, or instruments, but also its own rules? The voluntary aspect in agreeing to abide by KSHSAA's rules is the desire to become involved in interscholastic competition. The nature of interscholastic competition demands that there be a set of rules all competing schools are willing to abide by. It should be understood that a school wanting to compete in sports or other activities with other schools will agree to abide by the rules they all agree on—whether each school may like or dislike a particular rule.

In *Kirby v. The Michigan High School Athletic Association,* 585 N.W. 2d 290, 296, n. 17 (1998), the Michigan Supreme Court described the nature of an athletic association as follows:

> "Athletic competition takes place under a unique set of circumstances. . . . The means and objectives of athletic competition do not always "make sense" in an external fashion—rather, participants seek to better themselves through discipline of striving for goals that exist within the specific rules of each sport.
>
> Ftnt. 17 The articles or bylaws that establish the MHSAA are not part of this record. However, as indicted earlier, the MHSAA is an association of Michigan high schools. Thus, it is a creature of its members, with no independent authority over schools or students. The

schools can and should exercise appropriate oversight of the MHSAA."

Even in those cases where the eligibility rules of the athletic association are subject to oversight by an agency of the state, it does not change the voluntariness of or the contractual aspect of the competing teams to play by those rules since there is no requirement that students participate in interscholastic athletic competition as part of their compulsory education.

Interscholastic associations only administer rules given to them by the membership. The interscholastic association enforces those rules to keep the adversarial contestants within prior agreed upon bounds. When the member exceeds or flaunts those bounds, as did Brentwood, the association's responsibility to its membership is to enforce the rules. The authority of the athletic association is derived from contract between the membership, subject to the laws of the state and not any state authority. Interscholastic associations are generally not state actors because they have no state governmental authority to legislate, mandate or promulgate the rules which the schools must follow apart from the will of its membership. They are merely contractual arbitrators subject to state laws. Review of the actions of the interscholastic association, whether involving a contract, civil right or otherwise is available through the state court and against the public or private members according to existing law. Federal intervention is neither warranted nor appropriate, nor necessary to protect individuals rights.

CONCLUSION

The "state actor" inquiry is a targeted one with the challenged **conduct** at the hub of the analytical wheel. The focal point is the connection between the state and the challenged **conduct** not the broader relationship between the state and the private entity. Regulation, without more, cannot establish the necessary nexus. *See United States*

Olympic Committee, 483 U.S. at 547, 107 S. Ct. 2971; *Blum, supra*. Indeed, even when a state has conferred monopoly status on a private entity, courts will not find state action on the nexus theory absent the snug relationship between the grant of the monopoly power and the challenged conduct itself. *See Jackson, supra,* and *Perkins, supra*. The false premise of Petitioner's perspective is that its claims mistake certain spokes of the analytical wheel for the hub, *i.e.* the centrality of the challenged conduct. The lack of any "symbiotic relationship" belies the applicability of state actor status to the TSSAA. Never, in the history of the United States has sports nor any specific aspect of sports been found to present a fundamental federal right nor constitute an aspect of a state's conduct of education. As a result, a private interscholastic athletic association such as the TSSAA is not a state actor as a general uniform constitutional principal. The Sixth Circuit should therefore be affirmed.

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APPENDIX A

Survey of Structure and Function of State High School Associations Compiled With the Assistance of the National Federation

Question	Yes	No
1. Is your Association created by your state legislature?	CA, FL, KS, NJ, WA	AL, AS, AZ, AR, CO, CT, DE, DC, GA, HI, ID, IL, IN, IA, KY, LA, ME, MD, MA, MI, MN, MO, MS, MT, NE, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WV, WI, WY
2. Is your Association governed or operated, controlled by a state department of education or other state agency?	CA, DE, DC, MD, NY, NV	AL, AS, AZ, AR, CO, CT, FL, GA, HI, ID, IL, IN, IA, KS, LA, ME, MA, MI, MN, MO, MS, MT, NE, NH, NJ, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY
3. Does any of your annual revenue come directly from the state?	CA, DE, DC, MD	AL, AS, AZ, AR, CO, CT, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MI, MN, MO, MS, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY
4. Does your Association include public, private and religious schools as full members?	AL, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MI, MN, MO, MS, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY	MD, TX, VA